DOCKET

{SHOW } PROCEEDINGS AND ORDERS DATE: 111984

CASE NBR 83-1-01865 ATX
SHORT TITLE Brooks, Owen H., et al. DOCKETED: May 15 1984
VERSUS Allain, Gov. of MS, et al.

Date	Proceedings and Orders
Apr 3 1984	Application for extension of time to docket appeal and order granting same until May 15, 1984 (White, April 4, 1984).
May 15 1984	Statement as to jurisdiction filed.
Jun 16 1984	Motion of appellees Allain, Gov. of MS, et al. to dismiss or affirm filed.
Jun 20 1984	DISTRIBUTED. September 24, 1984
Jun 20 1984	Brief of appellee MS Republican Executive Comm. in opposition filed.
Jul 11 1984	Record requested.
Jul 19 1984	Record filed.
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 9 1984	REDISTRIBUTED. October 12, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984

CONTINUE {

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Date	Proceedings and Orders
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	Judgment AFFIRMED. Concurring opinion by Justice Stevens. Dissenting opinion by Justice Rehnquist with whom The Chief Justice joins. (Detached opinion.)

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JURISDICTIONAL

STATEMENT

Office-Supreme Court, U.S.
FILED
MAY 15 1984
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CLERK

No. 83-1865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OWEN H. BROOKS, *et al.*,
Appellants,

v.

BILL ALLAIN, Governor of Mississippi, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Mississippi

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, given an extensive past history of racial discrimination against black voters of Mississippi in voting and congressional redistricting, the District Court was prohibited by law from creating a 65 percent black congressional district in which black voters have an opportunity to gain representation of their choice as a remedy for a court-ordered plan found to deny black voters an opportunity to gain representation of their choice.

2. Whether the District Court's remedial plan violates the strict guidelines against racial dilution applicable to court-ordered plans and provides an effective remedy for voting rights violations by creating a large, sprawling, uncompact district which splits off adjoining black population concentrations.

PARTIES

Plaintiffs below are: Owen H. Brooks, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert L. Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry.

Appellees (defendants below) are: Bill Allain, Governor of Mississippi, Edwin Lloyd Pittman, Attorney General, Dick Molpus, Secretary of State, in their official capacities and as members of the Mississippi State Board of Election Commissioners (substituting the successors in office for the original defendants), and the Democratic and Republican State Executive Committees.

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OWEN H. BROOKS, *et al.*,
Appellants,

v.

BILL ALLAIN, Governor of Mississippi, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Mississippi

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JURISDICTIONAL STATEMENT

Appellants, black registered voters of Mississippi who reside in the Mississippi Delta area, appeal from the final judgment of the United States District Court for the Northern District of Mississippi, entered January 6, 1984, ordering into effect a new court-ordered congressional redistricting plan. While appellants agree with the District Court's holding that the pre-existing 1982 court-ordered plan violates Section 2 of the Voting Rights Act, they challenge the District Court's design of a new court-ordered plan, contending in this appeal that the new plan does not meet this Court's guidelines for court-ordered redistricting plans, that it follows from a misapplication of Section 2's language regarding proportional representation, that it misconstrues this Court's holding in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), and that it fails to remedy the Section

2 violation as well as a previous Section 5 violation found by the Attorney General relating to congressional districting in Mississippi.

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of Mississippi entered April 16, 1984, is unreported and is reproduced in Appendix A. The prior District Court opinion is reported at 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), and was vacated and remanded by this Court for reconsideration in light of Section 2 of the Voting Rights Act, as amended in 1982, 103 S.Ct. 2077 (1983).

The District Court opinion in a related case, *Mississippi* v. *Smith*, is reported at 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 103 S.Ct. 1888 (1983).

JURISDICTION

The judgment of the three-judge District Court ordering into effect a new court-ordered congressional redistricting plan was entered on January 6, 1984, and is reproduced herein as Appendix B. Appellants filed their notice of appeal on February 15, 1984, reproduced as Appendix C, within 60 days of the date of entry of the final judgment as provided by 28 U.S.C. § 2101(b). By Order dated April 4, 1984, Justice White extended the time for docketing this appeal to and including May 15, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1253.

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended in 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134, provides:

Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

For the past eighteen years, since 1966, black voters of Mississippi have been subjected to racial discrimination in congressional redistricting and denied an equal opportunity to elect candidates of their choice in congressional elections.

Mississippi is 35 percent black, and blacks are most heavily concentrated in the Delta area, in northwest Mississippi. Prior to the passage of the Voting Rights Act of 1965, Mississippi had a Delta congressional district which was 65.51 percent black,[1] but blacks were almost

[1] The old Delta district, which was then the Third Congressional District, was 65.51 percent black in population under the 1956 plan in 1960. In 1962 the Second and Third Districts were combined,

totally excluded from the electoral process by the State's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965). In 1966, just as black citizens were beginning to register and vote in substantial numbers, the Mississippi Legislature redrew the boundaries of the State's five congressional districts and divided the heavily-black Delta area horizontally among three congressional districts, depriving black voters of a voting majority in any of the districts. See *Mississippi* v. *Smith*, 541 F. Supp. 1329, 1331 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 103 S.Ct. 1888 (1983).[2] Although a District Court rejected a constitutional challenge to the 1966 plan,[3] that plan never received the Federal preclearance required by Section 5 of the Voting Rights Act. *Id.* This same pattern of dividing up the black population concentration of the Delta area and depriving black voters of a majority-black congressional district was followed in the 1972 and 1981 redistrictings enacted by the Mississippi Legislature. *Id.*

In March, 1982, the Attorney General of the United States objected pursuant to Section 5 of the Voting Rights Act to Mississippi's 1981 congressional redistricting plan (the "least change" plan) for unlawful fragmentation and dilution of black voting strength in the Delta area.[4] Although the Mississippi Legislature was

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and the black population percentage was reduced to 59.29 percent. Ex. P-13A.

[2] The history of Mississippi congressional redistricting was extensively discussed in our prior Jurisdictional Statement in *Brooks* v. *Winter*, No. 82-233, pp. 16-23.

[3] *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court) (newspaper articles showing racial motivation may not be used to impeach "the solemn acts of the Congress or of State legislatures"), *aff'd mem.*, 386 U.S. 483 (1967).

[4] In his Section 5 objection letter, the Attorney General found that prior to the enactment of the Voting Rights Act, Mississippi had one congressional district in the Mississippi Delta area which was 65 percent black. The Mississippi Legislature's 1981 plan, he found, contained districts which "have been drawn horizontally across the majority-black Delta area in such a manner as to dismember the black population concentration and effectively dilute its voting strength." See *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, Appendix B, pp. 25a-29a.

then in session when the Attorney General's Section 5 objection was announced, and has held two regular sessions since then, no new legislative congressional redistricting plan has been enacted by the Mississippi Legislature.[5]

Appellants Owen H. Brooks, et al., filed this class action in April, 1982, seeking a court-ordered plan for the conduct of congressional elections. After a trial, the three-judge District Court in June, 1982 enjoined use of the "least change" plan based on the Section 5 objection and enjoined use of the then-existing 1972 plan for unconstitutional malapportionment. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vacated and remanded sub nom. Brooks* v. *Winter*, 103 S.Ct. 2077 (1983).

Appellants urged the District Court to order into effect one or the other of two plans (the "Kirksey plans") which kept the Delta area intact within one congressional district and combined the Delta area with adjoining, predominantly black portions of Hinds County and the City of Jackson (which is located within Hinds County), resulting in plans which each had one majority-black congressional district which were 64.37 percent black and 65.81 percent black, respectively. 541 F. Supp. at 1140. Instead, the District Court ordered into effect a

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[5] Mississippi filed a judicial preclearance action in the District Court for the District of Columbia for approval of its 1981 plan, but that action was voluntarily dismissed by the State after the District Court denied the State's motion for summary judgment. *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 103 S.Ct. 1888 (1983).

plan (the "Simpson plan") which combined the Delta area with six predominantly-white Hill counties in east-central Mississippi, resulting in four majority white districts and one district (the Second District) which had a slight black population majority of 53.77 percent (*id.* at 1139) but which had a white voting age population majority (black voting age population of 48.05 percent) (District Court Opinion of April 16, 1984, App. A attached, p. 5a). In the 1982 congressional elections in the Second District a black candidate, veteran state legislator Robert Clark, won the Democratic primary but lost the general election to a white opponent, the District Court in its most recent opinion found, in part because of racial bloc voting by whites and racial campaigning by the white candidate which induced racially polarized voting. App. A, pp. 10a-12a.

The black voter plaintiffs appealed, contending that the District Court's 1982 court-ordered plan unnecessarily diluted black voting strength in the face of alternative, more compact plans which would have preserved the Delta area intact and would have avoided combining the Delta area with predominantly white Hill counties to diminish black voting strength. The state official defendants also appealed, contending that the District Court erred in implementing a court-ordered plan. This Court in May, 1983 vacated and remanded the District Court's decision "for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended in 1982." *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983).

On remand, after a two-and-a-half-day trial in December, 1983, the District Court ruled that in the structure of the Second Congressional District its 1982 court-ordered plan unlawfully diluted black voting strength in violation of Section 2 of the Voting Rights Act, as amended in 1982:

> The combination of six predominantly white eastern counties with the Delta region's black population, when considered in light of the effects of past discrimination on black efforts to participate in political affairs and the existence of racially polarized voting, operated to minimize, cancel, or dilute black voting strength in the Second District.

App. A, p. 11a. On the facts presented at trial, the District Court found that black voters in the Delta area, under the new Section 2 standard, have less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. The court found that Mississippi has a long history of official racial discrimination in voting which "includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering for the vote." App. A, p. 9a. The effects of this past discrimination, the court found, "presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century." *Id.* The court also found that black political participation in the Delta area is impeded by facts showing that blacks in the Delta area have disproportionately lower median family income ($7,447 for blacks, as compared with $17,467 for whites), less education (more than half have less than nine years of education, while the majority of whites are high school graduates), unemployment rates which are two to three times higher than the white unemployment rate, and inferior housing conditions. *Id.*, p. 10a.

Equal black political participation in Mississippi elections, the District Court determined, also is impeded by racial bloc voting, which deprives black voters of an equal opportunity to elect candidates of their choice in a district in which they do not have a voting majority:

> Plaintiffs' proof, also based on analysis of these election returns, demonstrated a consistently high degree of racially polarized voting in the 1982 election and previous elections. From all of the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population. Since the Second District under the Simpson Plan does not have a majority black voting age population, the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice.

Id., pp. 10a-11a.

At the second trial plaintiffs urged, on the basis of this factual proof showing that black voters in Mississippi are seriously disadvantaged politically, that a district which is 65 percent black in population or 60 percent black in voting age population was necessary as a remedy to give black voters an equal opportunity to participate in the political processes and to elect candidates of their choice. The State of Mississippi has stipulated that because of low black voter registration, turnout, and racial bloc voting, absent exceptional circumstances, "a district should contain a black population of at least 65 percent or a black VAP of 60 percent to provide black voters with an opportunity to elect a candidate of their choice."[6] Similar findings have been made by District

[6] This stipulation, which was entered into in *Mississippi* v. *Smith*, and which was admitted in evidence in this case (Ex. P-1, p. 5, ¶ 16), establishes:

> 16. Low black voter registration and voter turn-out combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of 60 percent to provide black voters with an opportunity to elect a candidate of their choice. In more recent elections black candidates have, on occasion, been elected to public office from districts with a population less than 65 percent black.

Courts in reviewing Mississippi redistricting plans under Section 5 of the Voting Rights Act. *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980); *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1059 (1980). The expert witness testimony adduced at the second trial from Dr. Gordon Henderson, professor of political science at Earlham College and an experienced Mississippi election analyst, and State Senator Henry Kirksey, also an experienced redistricting expert, supports this conclusion (Trial Transcript, Dec. 19-21, 1983, pp. 129, 173-74), as does testimony from seven black political and community leaders from Delta counties.[7]

[7] Ex. P-22, Dr. Robert E. Young, Washington County, p. 65 (district should be 65 percent black or more so that black people could "overcome this historical feeling of hopelessness or disbelief that they can really make a difference"); Ex. P-23, Gregory Flippins, Bolivar County, former mayor, p. 25 (district would have to be 60 percent or 65 percent black in voting age population); Ex. P-24, Attorney Thomas Morris, Bolivar County, pp. 10-11 (district would have to be 65 percent black in population because of "past discrimination in the voting process and in the past attempts to disenfranchise blacks"); Ex. P-25, Samuel McCray, community organizer, Quitman County, p. 67 (district would have to be 65 percent black for black voters to have "a fair chance of electing a person of [their] choice"); Ex. P-27, Jake Ayers, Mississippi Freedom Democratic Party community organizer, Washington County, pp. 20-21 (district would have to be at least 58 percent black in voting age population in order for blacks to have an equal opportunity to elect candidates of their choice); Ex. P-28, Clarence Hall, Issaquena County, p. 9 (district would have to be 60 percent black in voting age population); Ex. P-30, Attorney Edward Blackmon, presently, member of the Mississippi House of Representatives, Madison County (district must be 68 percent to 70 percent black).

At the second trial, plaintiffs offered two additional, geographically-compact congressional redistricting plans based on existing voting precincts. One contained a majority black district in the Delta area which was 64.35 percent black in population (Ex. P-81) and another contained a majority black district in the Delta area which was 63.60 percent black in population (Ex. P-82). Both plans, Senator Kirksey testified, would give black voters a reasonable opportunity to elect candidates of their choice in the one majority black district (Tr. 166-67, 174).

The District Court rejected plaintiffs' proposed remedial plans for the express reason that these plans "would probably insure the election of a black congressman in the Second District" (App. A, p. 15a). This factor, the District Court held, was inconsistent with the disclaimer in Section 2, as amended (App. A, pp. 14a-15a), which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

> The court rejected alternative plans offered by plaintiffs which would achieve a significantly higher black voting age population (approximately 60%) in the Second District. Plaintiffs argue that a black voting age population of such preponderance is required for blacks to elect representatives of their choice. Amended § 2, however, does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process.

App. A, p. 14a. The court stated that its own plan "satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi" (*id.*). The District Court also gave as reasons for rejecting plaintiffs' plans that they would reduce the black population percentage in the Fourth District to the 33 percent level (from 41.99 percent in the court's plan) (App. A, p. 14a), and would combine urban areas of the City of Jackson with the rural Delta area (*id.*).

For the 1984 congressional election, the District Court devised a new plan which, in the Second District, eliminated five of the six predominantly-white Hill counties, and which extended further south to take in two majority-black River counties and portions of the Jackson suburbs in Hinds County. These changes increased the black population percentage of the Second District to 58.30 percent from 53.77 percent, and increased the black voting age population percentage to 52.83 percent from 48.05 percent (App. A, p. 13a). The District Court acknowledged, however, that its new plan "does not provide a compact geographical configuration for the Second District" (*id.*, p. 15a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents the important issues surrounding the scope and application of a District Court's remedial authority when designing a court-ordered redistricting plan in the wake of a violation of Section 2 of the Voting Rights Act.

With the new amendment to Section 2 taking effect in the summer of 1982, this Court has yet to consider the proper remedial response to a Section 2 violation where the legislature abandons its duty to fashion a lawful plan. Indeed, this Court has never fully explicated the remedial parameters involved after a finding of vote dilution in a constitutional case, although several decisions have skirted the edges of the issue.[8]

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[8] *Connor* v. *Finch*, 431 U.S. 407 (1977), is probably the closest. The lower court designed a legislative redistricting plan after the Attorney General objected to the legislature's plan under Section 5. Plaintiff's appeal to this Court contended that the lower court-ordered plan was malapportioned and, in addition, diluted black voting strength. This Court reversed on the malapportionment issue, without ruling on the dilution claims, but prescribed guide-

Lower courts all over the South are hearing cases involving the 1982 amendment to Section 2 in all of its aspects, including the question of remedial relief. *See e.g., Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three judge court); *Valesquez* v. *City of Abilene*, —— F.2d —— (5th Cir. 1984); *Jones* v. *City of Lubbock*, ——F.2d —— (5th Cir. 1984). Guidance from this Court would be of great help.

While appellants challenge the District Court's remedial order in part on the basis of factual considerations relevant to congressional redistricting in the State of Mississippi, they also raise broader issues of the proper standards for a court-ordered redistricting plan, the correct construction of Section 2's proportional representation disclaimer, and the application of this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977).

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lines so that the district court could avoid dilution problems upon remand. 431 U.S. at 421-426.

White v. *Weiser*, 412 U.S. 783 (1972), involved a malapportionment case and did not present any dilution questions. *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), was a dilution case, but the issues before this Court went only to whether the remedial plan was court-ordered or not, and whether court-ordered plans for local governments must have single-member districts. *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), was limited to the distinction between a court-ordered and a legislative plan, as was *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981). *Upham* v. *Seamon*, 456 U.S. 37 (1982) dealt with the District Court's remedial power after a *Section 5* objection by the Attorney General, in the *absence* of a constitutional adjudication of vote dilution. *Rogers* v. *Lodge*, 458 U.S. 613, 627-628 (1982), devoted only a paragraph to the remedial issue, merely holding that the District Court and Court of Appeals had found no factors to militate against the use of single-member districts after an at-large system had been ruled unconstitutional.

I. THE DISTRICT COURT MISCONSTRUED GOVERNING LEGAL REMEDIAL PRINCIPLES WHEN IT HELD THAT IT WAS PROHIBITED BY LAW FROM ESTABLISHING A REMEDIAL DISTRICT WHICH WOULD GIVE BLACK VOTERS AN OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE.

The issue in this case is not whether plaintiffs' rights have been violated in congressional redistricting—all parties now concede that there was a violation—but rather what remedy should the District Court fashion to make the victims of discrimination whole. The District Court determined that its own prior plan violated amended Section 2 by denying black voters in the Delta area an equal opportunity to participate in the political processes and to elect candidates of their choice. Given the equitable remedial principle that the remedy should be determined by the nature and scope of the violation, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it follows that black voters of Mississippi who have been discriminated against in congressional redistricting for the past eighteen years should now be given an opportunity to gain representation of their choice in one congressional district.

The District Court erred in holding that it was prohibited by law from fashioning a plan containing one district with a sufficiently large black voting age population majority as to give black voters an opportunity to elect representatives of their choice. First, the District Court clearly was wrong when it ruled that creating one 65 percent black district would constitute proportional representation. The overwhelming testimony was that even creating a 65 percent black district would not guarantee the election of a black member of Congress. Nevertheless, black people comprise 35 percent of the state's population and 31 percent of the state's voting age population. Providing black voters with an opportunity to

elect one out of five members of Congress (20 percent) does not constitute proportional representation in any sense.

Second, the District Court disregarded the statutory language of the 1982 amendment to Section 2 and its legislative history when it ruled that Section 2 prohibits the creation of a 65 percent black district as a remedy for proven racial discrimination in redistricting. Section 2's disclaimer against a right to proportional representation clearly is addressed to the issue of what constitutes a violation of Section 2, not to the design of a remedy. Section 2(b) begins: "A violation of subsection (a) is established if . . ." The extent to which minority officeholders have been elected "is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This entire subsection addresses only what constitutes a violation, and does not control the issue of a remedy. No protected group has a right to proportional representation, therefore the lack of proportional representation does not, in and of itself, constitute a violation of Section 2.

This disclaimer is directly derived from this Court's decision in *White* v. *Regester*, 412 U.S. 755 (1973), in which the Court held:

> To sustain such claims [that multimember districts are being used invidiously to cancel out or minimize minority voting strength], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.

412 U.S. at 765-66. See S. Rep. No. 97-417, 97th Cong., 2d Sess. 28, 31-32 (1982). Congress did not intend by this disclaimer to limit the options available to District Courts in considering a remedy:

> The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

Id. at 31 (footnote omitted).

In this case the District Court, having struck down its own prior plan for failing to provide black voters with an opportunity to elect candidates of their choice, failed to exercise "its traditional equitable powers" to "completely remedy" this dilution of black voting strength by failing fully to provide "equal opportunity for minority citizens to participate and to elect candidates of their choice." In fact, the trial court rejected plaintiffs' proposed plans for the explicit reason that would "probably insure the election of a black congressman."

This determination has very serious implications for the large group of voting rights cases currently being litigated under Section 2. If black voters in Section 2 cases are deprived of remedies commensurate with the scope of the violation (discriminatory denial to minority voters of the opportunity "to elect representatives of their choice"), the recently-enacted amendment to Section 2 which was designed by Congress to provide minority voters with a new statutory framework for overcoming racial discrimination in voting could well be rendered nugatory.

The District Court also disregarded this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), when it condemned plaintiffs' efforts to create a 65 percent black district as "an obvious racial gerrymander" (App. A, p. 14a). In that case the issue was whether the New York Legislature was constitutionally prohibited from creating 65 percent black state legislative districts to meet the requirements of Section 5 of the Voting Rights Act, and the Court determined

that there was no constitutional violation. The Court determined that the constitution did not prohibit race-conscious remedies for dilution of minority voting strength "to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." 430 U.S. at 168 (plurality opinion of White, J.)

Here the District Court's own findings demonstrate that merely creating a razor-thin 52.83 percent black voting age population majority is not sufficient to "afford fair representation" to discriminated-against black Mississippi voters. The District Court found that the effects of past discrimination continue to impede electoral participation by black voters in Mississippi. Because of this past discrimination, and continued disparities in income, education and other socio-economic measures which depress minority political participation, black voter registration and turnout are still disproportionately lower than white registration and turnout. Black voters also are deprived of opportunities to gain fair representation in districts in which they lack a substantial voting majority by a "consistently high degree of racially polarized voting" by white voters. The overwhelming weight of the proof and testimony in this case is that this 52.83 percent voting age population majority is simply not enough to enable black voters to overcome these enormous and continuing barriers to equal black political participation in the Delta area. To the extent that the District Court may have thought otherwise (App. A, pp. 13a-14a), those findings are contrary to the overwhelming weight of the evidence and are clearly erroneous.[9]

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[9] For the defendants, Dr. Thomas Hofeller stated that a razor-thin black VAP majority of 50.13% in the Second District was sufficient to insure black voters equal access to the political process.

The other reasons given by the District Court for rejecting plaintiffs' plans also should be rejected. Combining the heavily-black Delta counties with predominantly-black areas of the City of Jackson should not constitute a serious obstacle to giving black voters an opportunity for representation of their choice. All of the districts, to some extent, combine urban and rural areas. The Fifth District combines the urban Gulf Coast area with extremely rural and sparsely-populated areas of south Mississippi, and the chairman of the Mississippi Legislature's Joint Congressional Redistricting Committee testified that this was unavoidable and not inconsistent with state policy in congressional redistricting (1982 Trial Transcript, p. 243). In addition, any increase in black voting strength in the Second District must necessarily decrease the percentage of blacks in some adjoining district. This does not constitute a prohibited dilution of black voting strength where the adjoining district does not contain a black voting majority. There was literally no evidence presented at trial that a decrease in the black population percentage in the Fourth District by eight percentage points would necessarily make the Fourth District Representative insensitive to minority needs (App. A, p. 14a).

Tr. at 410, 454. However, he conceded that his figures did not take into account the conditions of lower black voter registration, lower black turnout, and lesser financial resources for black candidates which pervade the State of Mississippi and the Delta. Nor did his conclusion account for the advantage of incumbency which white Republicans now have in the Second Congressional District. *Id.* at 456-463. Moreover, his razor-thin edge would only protect equal access, according to his testimony, so long as the white crossover voting rate reached at least the level which occurred in the 1982 general election. Any slippage would render his conclusion invalid. *Id.* Finally, Dr. Hofeller admitted that he had testified in the Chicago City Council redistricting case, *Ketchum* v. *Byrne*, that a district must be 65% black in total population to give black voters an equal opportunity to elect candidates of their choice, and that a 58% black ward was not "a viable black ward." *Id.* at 465-470.

II. THE DISTRICT COURT'S PLAN VIOLATES THE STRICT GUIDELINES ESTABLISHED FOR COURT-ORDERED PLANS BY THIS COURT IN *CONNOR* v. *FINCH*.

It is axiomatic that court-ordered redistricting plans are judged by stricter standards than those designed by legislatures. *Connor* v. *Finch*, 413 U.S. 407, 414 (1977). Two of the areas in which courts must be more careful than legislatures are compactness of districts and avoidance of dilution of black voting strength. As this Court noted in *Connor*:

> [T]he District Court . . . should either draw legislative districts that are reasonably continguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished.

413 U.S. at 425-426.

Avoidance of racial vote dilution is also behind a third requirement for many court-ordered plans: the use of single-member districts instead of multimember districts. *Connor* v. *Johnson*, 402 U.S. 690 (1971); *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). Among the reasons for this requirement is that multimember districts "tend to submerge electoral minorities and overrepresent electoral majorities." *Connor* v. *Finch*, 431 U.S. at 415. While multi-member districting is not at issue in this congressional districting case, the reasoning underlying the single-member preference adds to the court's obligations to avoid the dilution of black voting strength in redistricting plans.[10] It demonstrates that

[10] In addition to the requisites cited above, court-ordered plans must adhere to lower population deviations than legislative plans. *Connor* v. *Finch*, 431 U.S. at 414. The overall deviation in the Kirksey Plans was less than one-tenth of one percent. Tr. at 166, 168. The District Court did not consider the respective deviations of its own plan or the Kirksey Plans to be a reason for preferring one over the other.

plans which might otherwise be constitutional and lawful if passed by a legislature can nevertheless be an abuse of the court's remedial discretion because they do not eliminate the potential for dilution as thoroughly as they could. *See Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 544 F.2d 139, 152 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977).

As noted by the Court in *Connor* v. *Finch*, aberrations from the goal of compactness may reflect potential dilutions of black voting strength. *Id.* at 425-426. *See also Karcher* v. *Daggett*, 462 U.S. ——; 103 S.Ct. 2653, 2672-73 (1983). This is particularly true when the district's sprawling shape makes it difficult for black candidates—who are generally poorer than white candidates—to travel from one end to the other to campaign. Thus, in *Rogers* v. *Lodge*, 458 U.S. 613, 627 (1982), the Court left undisturbed a lower court conclusion that, "as a matter of law, the size of the [district] tends to impair the access of blacks to the political process." *See also* S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 (1982) (listing as one of the probative factors of a Section 2 dilution case the use of "unusually large election districts"). Plaintiffs' expert, Senator Henry Kirksey, testified that large congressional districts adversely impinge on the efforts of black citizens to attain equal access to the political process. December 19-21, 1983 Hearing Transcript at 154-155.

Here, the Second District in the court-ordered plan constitutes an awkward, elongated north-south sprawl which the District Court candidly acknowledged as lacking in compactness. App. A, p. 15a. Moreover, to establish that district, the District Court rejected the much more compact Kirksey Plans which better preserve contiguous concentrations of black voting strength. By leaving portions of the City of Jackson out of the Second District the court's plan basically "cracks" and divides those contiguous concentrations and sacrifices any hope of compactness. The court has designed a long and

meandering district which does not come close in terms of black population percentage to the levels which plaintiffs' expert testimony has shown to be necessary to give black citizens an equal opportunity to elect candidates of their choice. Thus, the District Court failed to follow *Connor*'s mandate "to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." 431 U.S. at 425. Because the District Court has failed to adhere to the strict standards of compactness and painstaking avoidance of dilution of black voting strength, its judgment must be reversed.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDICES

APPENDIX A

District Court Opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC82-80-WK-0

DAVID JORDAN, *et al.*,
Plaintiffs,

v.

WILLIAM WINTER, *et al.*,
Defendants.

No. GC82-81-WK-0

OWEN H. BROOKS, *et al.*,
Plaintiffs,

v.

WILLIAM F. WINTER, *et al.*,
Defendants.

(April 16, 1984)

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Before CLARK, Chief Circuit Judge; SENTER, Chief District Judge; and KEADY, Senior District Judge.

PER CURIAM:

On June 8, 1982, this court ordered into effect on an interim basis a congressional redistricting plan for the State of Mississippi. *Jordan v. Winter*, 541 F.Supp. 1135, 1144-45 (N.D. Miss. 1982). On appeal, the United States Supreme Court vacated this court's judgment and remanded the case for further consideration in light of Section 2 of the Voting Rights Act of 1965, —— U.S. ——, 103 S.Ct. 2007 (1983).

This court held an evidentiary hearing in December of 1983. On the basis of the evidence adduced at trial and the pleadings, briefs, and argument of counsel, we concluded that the court-ordered plan, or Simpson Plan, violated amended § 2. The court found that the structure of the Second Congressional District in particular unlawfully diluted black voting strength. Accordingly, on January 6, 1984, we entered judgment directing the use, until the Mississippi Legislature enacts a valid congressional redistricting plan, of an interim plan fashioned by the court with the aid of the parties. Pursuant to the reservation set out in that final judgment, we now enter Findings of Fact and Conclusions of Law in support of that judgment, in conformity with Fed. R. Civ. P. 52(a).

I. *Procedural History*

The history of the legislative and judicial efforts to secure a constitutional congressional redistricting plan for the State of Mississippi is set out in our prior decision in *Jordan v. Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982). Only a brief summary is required here.

The 1980 official census revealed a total population disparity in Mississippi's 1972 congressional districting plan of 17.6%. Recognizing the constitutional problem posed by such malapportionment, *see* U.S. Const. Art. 1, § 2; *Reynolds v. Sims*, 377 U.S. 533 (1964), the Mississippi Legislature in 1981 enacted S.B. 2001[1] for redistricting

[1] 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8.

the state's five congressional districts. The Attorney General of the United States, after reviewing the plan pursuant to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c,[2] interposed a timely objection on March 30, 1982. The Attorney General found the plan defective because it divided the concentration of black majority counties located in the northwest or "Delta" portion of the state among three districts rather than concentrating them in a single district.[3] He concluded that this configuration constituted an unlawful dilution of minority voting strength.

The Mississippi Legislature did not attempt to enact another plan or otherwise to obtain preclearance from the Attorney General. On April 7, 1982, it filed a declaratory judgment action in the United States District Court for the District of Columbia seeking judicial preclearance of S.B. 2001. *Mississippi v. Smith*, No. 82-0956. That action has since been voluntarily dismissed.

The Jordan and Brooks plaintiffs then filed class actions to enjoin enforcement of S.B. 2001 until it was precleared, to prohibit further use of the 1972 plan because of population malapportionment, and to secure a court-ordered interim plan for the 1982 congressional elections and thereafter until change by law. A three-judge district court was convened pursuant to 28 U.S.C. § 2284.

[2] Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S.B. 2001 was a change in voting standards, practices, or procedures within the meaning of § 5.

[3] The Mississippi Delta consists of the following counties: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Zazoo. Mississippi's congressional districting plans from 1882 to 1966 all contained a district encompassing most of the Delta counties. 541 F. Supp. at 1139 and n.2. Maps depicting the congressional districts as they existed under the 1962 plan and under S.B. 2001 are attached. District 2 of the 1962 plan contains most of the Mississippi Delta.

Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973j(f). This court declined to place the unprecleared S.B. 2001 into effect on an interim basis and concluded that the 1972 plan was unconstitutionally malapportioned and therefore also unsuitable for interim use. *Jordan v. Winter*, 541 F.Supp. at 1142. It thus limited its consideration to two plans advocated by the plaintiffs and one advocated by the AFL-CIO as amicus curiae.

Plaintiffs urged the court to order into effect either of two plans devised by Senator Henry J. Kirksey, a black state legislator. Both plans kept the Delta area intact and achieved black majority districts by combining the Delta area with predominantly black portions of Hinds County and the City of Jackson. 541 F.Supp. at 1140. Plaintiffs' preferred plan (Kirksey Plan 1) contained one district that was 64.37% black; the alternative plan (Kirksey Plan 2) contained one district that was 65.81% black. *Id.* The plan urged by the AFL-CIO, the "Simpson Plan," combined fifteen Delta and part-Delta counties with six predominantly white eastern rural counties to produce four majority white districts and one district with a black population majority of 53.77%. *Id.* at 1141. The Kirksey Plan 1 had a total population variance of .2150%; the Kirksey Plan 2 a variance of .230%, and the Simpson plan a variance of .2141%.

The court was bound by *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982), to fashion an interim plan that adhered to the state's political policies to the extent those policies did not violate the Constitution or the Voting Rights Act. 541 F.Supp. at 1141. The court determined that the following political policies underlay the passage of S.B. 2001:

> (1) Minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population.

Id. at 1143. Because the Simpson Plan most nearly accorded with the latter three policies, which the court found to be constitutionally and statutorily valid,[4] we ordered it into effect on an interim basis. That plan was used for the 1982 congressional elections. It is depicted on a map appended to our prior decision, *id.* at 1146, and is statistically described as follows:

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.94

Although the Second District under the Simpson Plan was a majority black district (53.77%), it had a minority black voting age population of 48.05%.

Analysis of the Simpson Plan under the standard established in amended § 2 of the Voting Rights Act of 1965 reveals its invalidity.

II. *Amended Section 2*

Section 2 of the Voting Rights Act of 1965, as amended, presently reads:

> Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in con-

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[4] As to the first policy, the court recognized that the validity of the Attorney General's conclusion that drawing lines for Districts 1, 2, and 3 from east to west unlawfully diluted black voting strength was the primary issue in the proceedings then pending in the District Court of the District of Columbia. It therefore accepted, without indicating any view as to its validity, the Attorney General's conclusion. 541 F.Supp. at 1143.

travention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) a violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973 (West Supp. 1983). The amendment to Section 2 was designed to eliminate the requirement, prescribed in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 2332 (1980), that a plaintiff demonstrate intentional discrimination to establish a violation of section 2.[5]

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[5] S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. . . .

S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 (hereinafter cited as Senate Report). *See Jones v. City of Lubbock*, No. 83-1196 (5th Cir. Mar. 5, 1984); *Jordan v. City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1072 (6th Cir. 1983); *Campbell v. Gadsden County School Board*, 691 F.2d 978, 981, n.4 (11th Cir. 1982); *Seamon v. Upham*, CA No. P-81-49-CA (E.D. Tex. 1983); *Major v. Treen*, 574 F.Supp. 325, 342 (E.D. La. 1983); Blumstein, Defining and Proving Race Discrimination: *Perspectives on the Purpose v. Results Approach from the Voting Rights*

We reject the contention of the Republican Defendants that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the fifteenth amendment. We agree with the analysis and conclusion set out in *Major v. Treen*, 574 F.Supp. 325, 342-349 (E.D. La. 1983) (three judge court), which rejected a similar assault on the constitutionality of Section 2. We therefore adopt that treatment of this issue without repetition here.

The Senate Judiciary Report on the amendment states that the "results" language of new Section 2 was meant to "restore the pre-[*City of Mobile v.*] *Bolden* legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." Senate Report at 27. The Report then enumerates the factors courts should consider in deciding whether plaintiffs have established a violation of Section 2. These factors, derived from the Supreme Court's opinion in *White v. Regester*, 412 U.S. 755 (1973), as applied in this Circuit in *Zimmer v. McKeithen*, 485 F.2d 1287 (5th Cir. 1973) (en banc), *aff'd on other grounds sub. nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), include, but are not limited to:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

Act, 69 Va. L. Rev. 633, 689-70 (1983); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 726 (1982).

The Republican Defendants have argued that amended Section 2 preserves the requirement of proving discriminatory intent. We find this argument to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation.

2. The extent to which voting is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report at 28-29 (footnotes omitted). The Report also cites for consideration, as additional factors probative of a violation of Section 2: (1) whether elected officials are unresponsive to the needs of minority group members; and (2) whether the policy underlying the challenged procedure is "tenuous." *Id.* at 29. No particular number of these factors need be proved. *Id.*

III. *Amended Section 2 and the Simpson Plan*

The court finds that the aggregate of the following factors shows that the Simpson Plan unlawfully dilutes minority voting strength.

A. *Past Discrimination*

That Mississippi has a long history of de jure and de facto race discrimination is not contested. That history

has been often recounted in judicial decisions[6] and includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering for the vote. The State is a covered jurisdiction under the Voting Rights Act of 1965. The Attorney General has designated 42 of the counties in Mississippi for federal registrar enforcement of the right to vote.

We find that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi.[7] Blacks in Mississippi,

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[6] *See, e.g., United States v. Mississippi*, 380 U.S. 128 (1965); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144 (5th Cir. 1977); *Moore v. Leflore County Board of Election Commissioners*, 502 F.2d 621, 624 (5th Cir. 1974), *aff'g* 361 F.Supp. 603, 605 (N.D. Miss. 1972); *Mississippi v. United States*, 490 F.Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[7] The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participations, e.g. *White* [*v. Regester*], 412 U.S. at 768; *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 [(5th Cir. 1977)]. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Senate Report No. 417, 97th Congress 2d Sess. at 29, n.114.

especially in its Delta region, generally have less education, lower incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. *See* United States Commission on Civil Rights, *Voting in Mississippi*, pp. 3-4 (1965). Census statistics indicate lingering effects of this past discrimination: the median family income in the Delta Region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing.

B. *Racial Bloc Voting*

Plaintiffs have established that voters in Mississippi have previously voted and continue to vote on the basis of the race of candidates for elective office. The state defendants had conceded as much prior to the 1982 elections, but attempted to show at trial that the 1982 campaign in the Second District was not characterized by racial bloc voting. The evidence defendants presented was that the black Democratic candidate, Robert Clark, received approximately 15% of the white vote in the 1982 general election and that Clark won the Democratic nomination in a primary contest against white opponents. The primary election in the Second District conducted under our prior plan was characterized by confusion and low voter turnout due to a variety of factors, including uncertainty about election dates, the recent realignment of the district, and the lack of an incumbent. The race was additionally atypical because of a court order allowing Republican voters to participate in the Democratic primary. Clark's victory in the primary was followed by defeat in the general election—a defeat we find was caused in part by racial bloc voting. Plaintiffs' proof,

also based on analysis of these election returns, demonstrated a consistently high degree of racially polarized voting in the 1982 election and previous elections. From all of the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population. Since the Second District under the Simpson Plan does not have a majority black voting age population, the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice. As the Supreme Court held in *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3279 (1982):

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.

C. *The State Policies Underlying the Simpson Plan*

This court previously adopted the Simpson Plan for interim use primarily because it conformed to the State legislature's policy of favoring the division of the black population of the State into two "high impact" districts rather than concentrating it into one district. 541 F. Supp. at 1143-44. The results test required by Section 2 precludes dependence on this policy. The combination of six predominantly white eastern counties with the Delta region's black population, when considered in light of the effects of past discrimination on black efforts to participate in political affairs and the existence of racially polarized voting, operated to minimize, cancel, or dilute black voting strength in the Second District. *Kirksey v. Board of Supervisors*, 554 F.2d at 150; *see Major v. Treen*, 574 F.Supp. at 354; Hartman, *Racial Vote Dilution and Sepa-*

ration of Powers; An Exploration of the Judicial "Intent" and the Legislative "Results" Standards, 50 Geo. Wash. L. Rev. 689, 695 (1982). Our previous opinion relied on *United States v. Forrest County Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), and *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). Neither involved evidence of racial bloc voting. They are no longer apposite.

D. *Other Factors*

Plaintiffs produced other persuasive evidence that the political processes in Mississippi were not equally open to blacks. Evidence of racial campaign tactics used during the 1982 election in the Second District supports the conclusion that Mississippi voters are urged to cast their ballots according to race.[8] This inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts.

IV. *The Court-Ordered Interim Plan*

In devising a plan to replace our prior plan for the impending election, we recognized the obligation to: (1) achieve the least possible deviation from the one person, one vote ideal, *Chapman v. Meier*, 420 U.S. 1, 26-27, 95 S.Ct. 751, 765-66 (1975); (2) design a plan that is not

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[8] One campaign television commercial sponsored by the white candidate whose slogan was "He's one of us" opened and closed with a view of Confederate monuments accompanied by this audio message:

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.

racially discriminatory in either purpose or effect, *McDaniel v. Sanchez*, 452 U.S. 130, 148, 101 S.Ct. 2224, 2235 (1981); and (3) adhere to the state's policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act, *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 1520-21 (1982).

The plan ordered into effect by our final judgment of January 6, 1984, meets these requirements. The statistics of that plan are set out below.

Congressional District	Total Population	Percent Variance From the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	% Black VAP
1	504,077	—.0101%	124,136	24.63%	346,074	74,166	21.43%
2	504,024	—.0206%	298,533	58.30%	322,719	170,491	52.83%
3	504,242	+.0226%	161,710	32.07%	348,524	98,478	28.26%
4	504,187	+.0117%	211,714	41.99%	346,370	129,618	37.42%
5	504,168	—.0040%	95,808	19.01%	342,754	57,068	16.65%
		Range .0432					

The interim plan was constructed under these criteria: create a rural Delta-River area district with a black voting age population majority; achieve minimal deviation from the ideal population per congressional district of 504,128; create districts containing voters with similar interests; preserve the electoral base of incumbents; and comply with the legislative goal of achieving high impact districts without splintering cohesive black populations.

We recognize that the creation of a Delta district with a majority black voting age population implicates difficult issues concerning the fair allocation of political power. *See* A. Howard & B. Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). Although the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), can come into tension with Congress' disclaimer in amended § 2 of any right to proportional representation, the plan we have adopted fully rectifies the dilution of black voting strength in the Sec-

ond District and satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi.

The court rejected alternative plans offered by plaintiffs which would achieve a significantly higher black voting age population (approximately 60%) in the Second District. Plaintiffs argue that a black voting age population of such preponderance is required for blacks to elect representatives of their choice. Amended § 2, however, does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process. In commenting upon the § 2 amendment, Senator Dole, a leading sponsor of the compromise legislation, stated: "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." Senate Report at 193. In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections. Credible expert testimony received in this case supports this conclusion. Additionally, plaintiffs' plans are an obvious racial gerrymander which would bring into the Second District overwhelmingly black sections of the City of Jackson and its suburbs; these inner-city, metropolitan areas have little in common with the interests of the predominantly rural Delta region. Also, plaintiffs' plans unnecessarily dilute black voting strength in the Fourth District. The Fourth District presently has a black population of 45.25%. The evidence presented indicates this is a factor in making the Fourth District representative reasonably receptive and sensitive to the needs of the black community. The plan adopted necessarily reduces the black population of the Fourth District to 41.99%.

To further reduce the black population in the Fourth District to 33.7 or 33.83% as proposed by plaintiffs (541 F. Supp. at 1140) would diminish the impact of black voters in that district. Although the plans proposed by plaintiffs would probably insure the election of a black congressmen in the Second District, the attempt to gain this election guaranty, which § 2(b) expressly disclaims, would have a certain adverse effect on the impact of the black voters in the Fourth District. Because of these considerations, we conclude that a black voting age population majority of 52.83% achieved under the court's plan will remedy the defect we now perceive in the Simpson Plan under the amended § 2.

We are cognizant that our court-ordered interim plan does not provide a compact geographical configuration for the Second District. However, it consists of rural Delta and river counties with similarities of interest; avoids gerrymandering a substantial portion of metropolitan Jackson into a district with these rural or farm counties; and yields the least adverse impact on the black voting influence in the Fourth District.

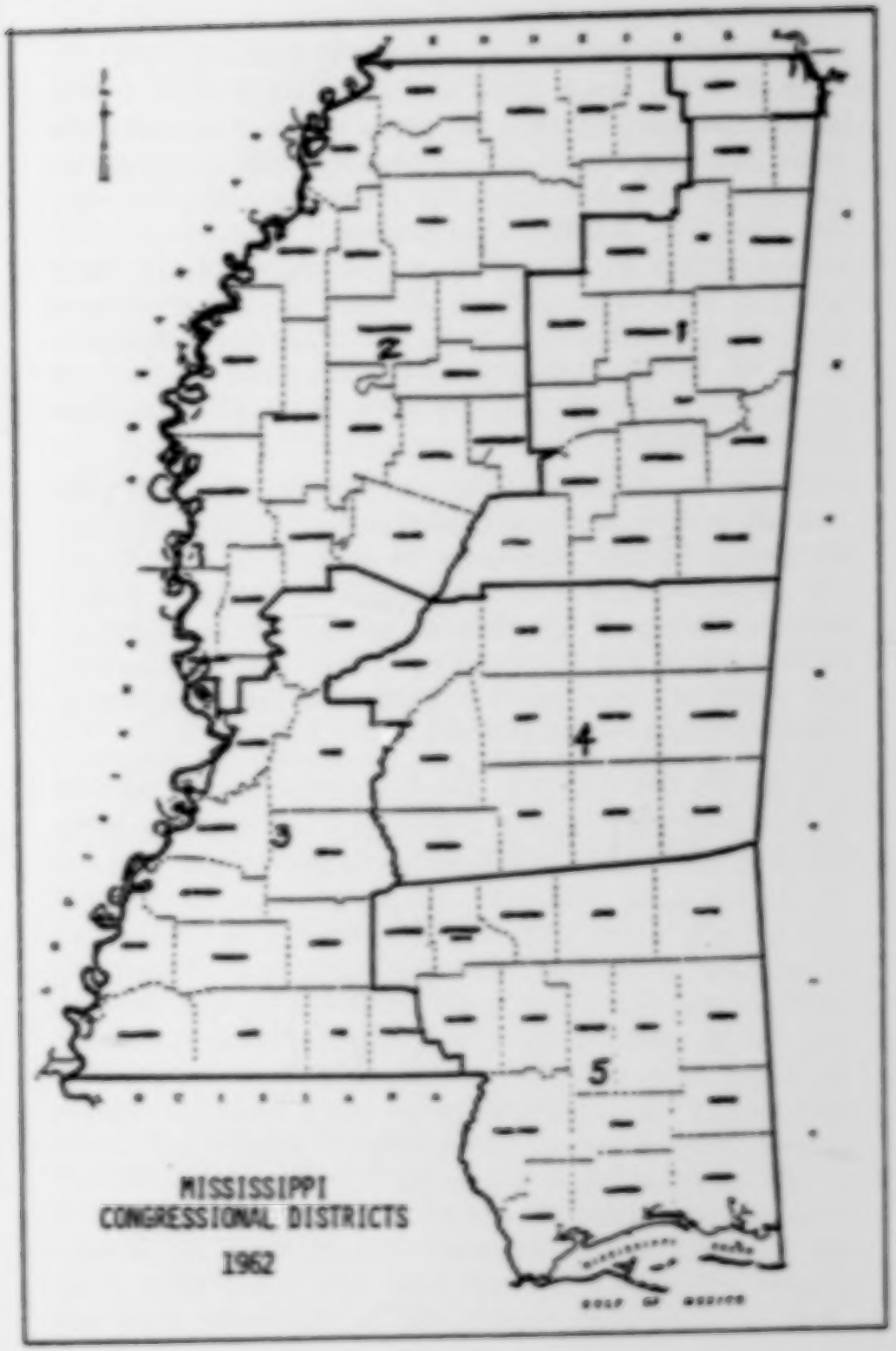
A specific description of the five congressional districts as established in our final judgment of January 6, 1984, and map outlining these districts, are attached.

/s/ C.C.

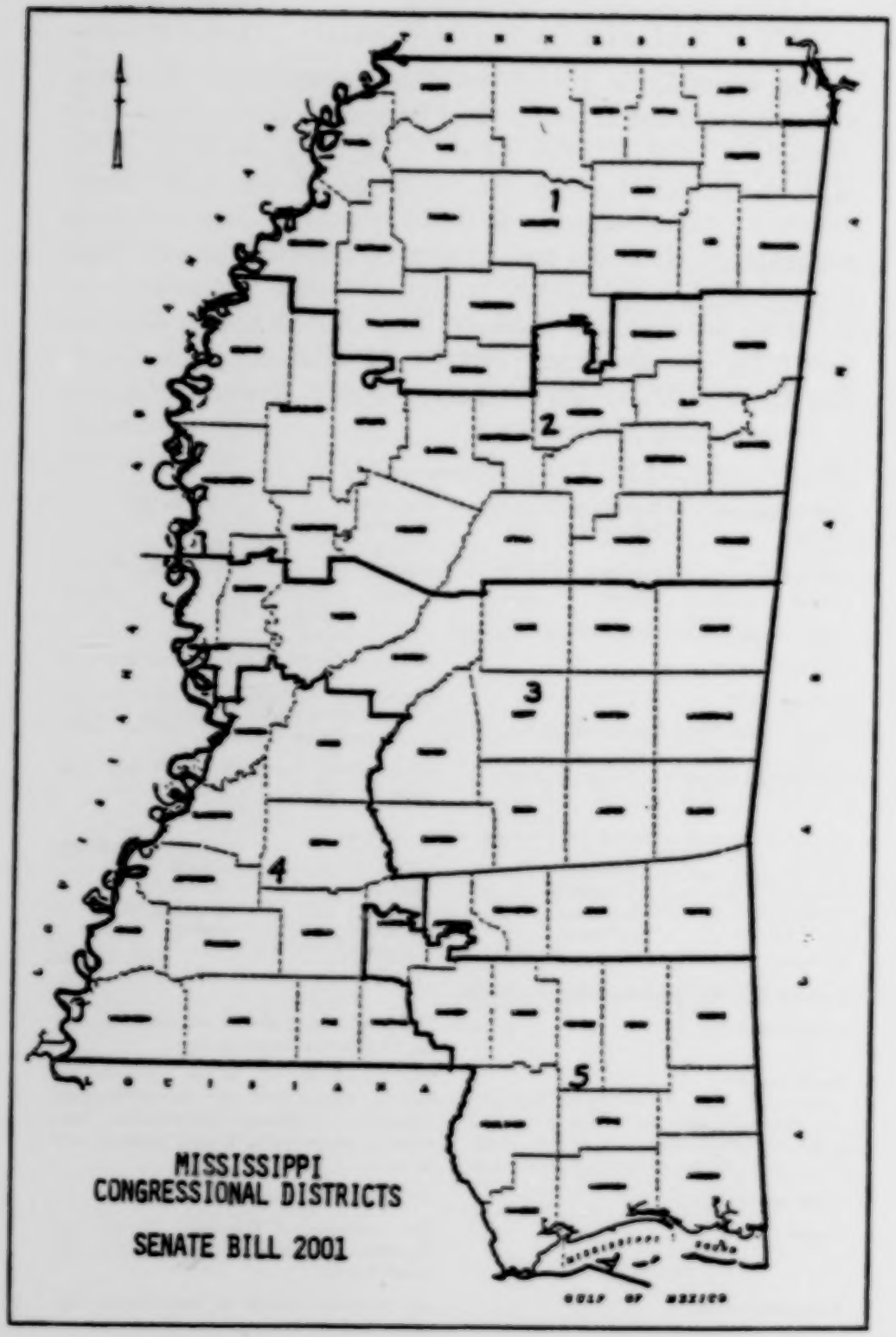
/s/ L.T.S.Jr.

/s/ W.C.K.

16a



17a



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CONGRESSIONAL DISTRICTS ESTABLISHED BY FINAL JUDGMENT OF JANUARY 6, 1984

The boundaries of all counties, supervisors' districts, and precincts listed below shall be such boundaries as they existed on July 1, 1981 (*see* 541 F.Supp. 1135 at 1145, N.D. Miss. 1982), with the exception of the supervisors' districts and precincts of Jones County. Jones County supervisors' districts and precincts referred to are those defined and incorporated in the Consent Judgment entered on October 26, 1983, by the United States District Court for the Southern District of Mississippi in Cause No. H-83-0200(R) styled Jones County Branch, NAACP v. Jones County, Mississippi.

District No. 1 shall consist of the following whole counties:

Alcorn	Itawamba	Montgomery	Tishomingo
Benton	Lafayette	Pontotoc	Union
Calhoun	Lee	Prentiss	Webster
Chickasaw	Marshall	Tate	Yalobusha
DeSoto	Monroe	Tippah	

together with the following parts of counties:

Choctaw County	All except for the Panhandle precinct;
Panola County	All except for the precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis;
Tallahatchie County	All precincts located in Supervisors' Districts 1, 2, and 3.

District No. 2 shall consist of the following whole counties:

Bolivar	Holmes	Leflore	Tunica
Carroll	Humphreys	Quitman	Warren
Claiborne	Issaquena	Sharkey	Washington
Coahoma	Jefferson	Sunflower	Yazoo
Grenada			

together with the following parts of counties

Attala County	The precincts of McAdams, Newport, Sallis, Shrock, and Possumneck;
Hinds County	The precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas, Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2;
Madison County	All except the precinct of Ridgeland;
Panola County	The precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis;
Tallahatchie County	All precincts located in Supervisors' District 4 and 5.

District No. 3 shall consist of the following whole counties:

Clarke	Lauderdale	Newton	Scott
Clay	Leake	Noxubee	Smith
Jasper	Lowndes	Oktibbeha	Winston
Kemper	Neshoba		

together with the following parts of counties:

Attala County	All except for the precincts of McAdams, Newport, Sallis, Shrock, and Possumneck;
Choctaw County	The Panhandle precinct;
Jones County	All new precincts located in new Supervisors Districts Nos. 1, 2, and 5; The New Blackwell precinct in new Supervisors' District No. 4; and All of new Supervisors' District 3 except the new precincts of Glade, Ovett, and Tuckers;
Madison County	The Ridgeland precinct;
Rankin County	All except for the precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star.

District No. 4 shall consist of the following whole counties:

Adams	Franklin	Lincoln	Simpson
Amite	Jeff. Davis	Marion	Walthall
Copiah	Lawrence	Pike	Wilkinson
Covington			

together with the following parts of counties:

Hinds County	All except the precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2.
Rankin County	The precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star.

District No. 5 shall consist of the following whole counties:

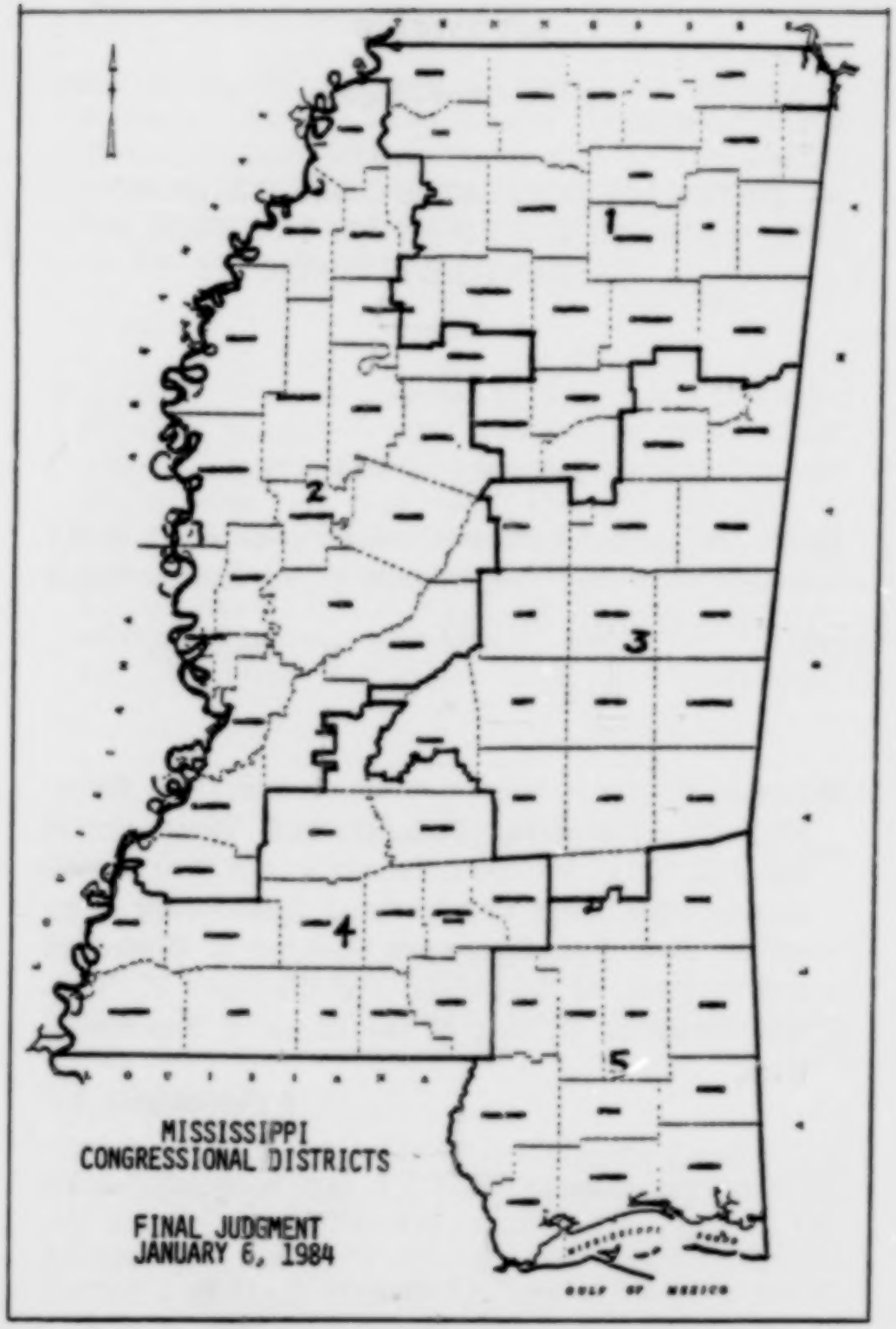
Forrest	Hancock	Lamar	Perry
George	Harrison	Pearl River	Stone
Greene	Jackson	Perry	Wayne

together with the following parts of counties:

Jones County	All new precincts in new Supervisors' District 4 except the new Blackwell Precinct; and in new Supervisors' District 3, the new precincts of Glade, Ovett, and Tuckers.

The statistics for each of the five congressional districts defined above are as follows:

Congressional District	Total Population	Percent Variance from the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	% Black VAP
1	504,077	—.0101%	124,136	24.63%	346,074	74,165	21.43%
2	504,024	—.0206%	293,838	58.30%	322,719	170,491	52.83%
3	504,242	+.0226%	161,710	32.07%	348,524	98,478	28.26%
4	504,187	+.0117%	211,714	41.99%	346,870	129,618	37.42%
5	504,108	—.0040%	95,808	19.01%	342,754	57,068	16.65%
		Range .0432					



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APPENDIX B

District Court Judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

Civil Action No. GC 82-80-WK-0

DAVID JORDAN and SAMMIE CHESTNUT, on behalf of the Greenwood Voters League, Individually and on behalf of others similarly situated,

Plaintiffs,

v.

WILLIAM WINTER, Governor of Mississippi; T.H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J.C. "CON" MALONEY, Secretary, and their successors in office, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants.

Civil Action No. GC 82-81-WK-0

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLIE MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of others similarly situated,

Plaintiffs,

v.

WILLIAM F. WINTER, Governor of Mississippi; EDWIN L. PITTMAN, successor in office to William A. "Bill" Allain, Attorney General of Mississippi; DICK MOLPUS, successor in office to Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners; STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants.

(January 6, 1984)

FINAL JUDGMENT

Before CLARK, Chief Circuit Judge, SENTER, Chief Judge, and KEADY, Senior Judge:

BY THE COURT:

Pursuant to the mandate of the Supreme Court of the United States of May 16, 1983, vacating the judgment and order of the district court entered June 10, 1982, and remanding the cases for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended June 29, 1982, —— U.S. ——, 77

L.Ed.2d 291 (1983) (Mem.), the district court reconvened, received additional oral and documentary evidence, and considered briefs and argument of counsel. In its bench ruling (appended hereto as Addendum "A"), the court found that the congressional redistricting plan it previously adopted violates amended Section 2, particularly as to the structure of the Second Congressional District. Therefore, the court-ordered redistricting plan previously entered must be revised.

Accordingly, it is

ORDERED:

That until a redistricting plan is duly enacted by the State of Mississippi and precleared in accordance with Section 5 of the Voting Rights Act of 1965, as amended, the five Mississippi congressional districts for the election of members of the United States House of Representatives in the primary and general elections for 1984 and thereafter are established as detailed on Addendum "B" hereto. A map depicting the foregoing court-ordered congressional redistricting plan is also appended hereto as Addendum "C".

The Court reserves the power to issue supplemental directions and orders should the need arise, to carry out the provisions of this judgment. The court also reserves the right to file an opinion at a later date.

This 6th day of January, 1984.

/s/ Charles Clark
United States Circuit Judge

/s/ L. T. Senter, Jr.
United States District Judge

/s/ William C. Keady
United States District Judge

OPINION OF THE COURT

Announced December 21, 1983

BY JUDGE CLARK:

Ladies and Gentlemen. The court has come to a decision which must be implemented with the assistance of the parties in the case because the court does not have the expertise or the precise figures to make a final judgment. Until such time as the Legislature of the State of Mississippi discharges its duty to redistrict the Congressional Districts of the State of Mississippi in accordance with the 1980 census, the court must act under the remand of the Supreme Court of the United States to reconsider its prior decision in this case in light of the reenacted Section 2 of the Voting Rights Act.

The court finds that the plaintiffs have shown by a preponderance of the evidence that the totality of the circumstances show that the political processes in District 2 in particular are not equally open to participation by members of a class protected by Section 2(A) of the amended Act in that the members of that class have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.

In order to guide the parties in assisting the court to draw a precise decree, the court announces the following guidelines. I'll ask the clerk at this time to hand to each of the parties two lists prepared by the court which relate to District 2.

ADDENDUM "A"

The Second Congressional District of the State of Mississippi will be comprised of the following whole counties: Bolivar, Carroll, Claiborne, Coahoma, Grenada, Holmes, Humphreys, Issaquena, Jefferson, Quitman, Sharkey, Sunflower, Tunica, Washington, Yazoo, Warren,

and Leflore. In addition, the following precincts from the following counties:

Hinds County—the precincts of Bolton, Brownsville, Edwards, Tinnin, Pocahontas, Pinehaven, Raymond 1 & 2, Cayuga, Utica 1 & 2, Chapel Hill, Dry Grove, and Learned.

Tallahatchie County—the precincts of Tippo, Philipp, Glendora, Tutwiler, Sumner, Webb, and Stover.

Attala County—the precincts of Shrock, Possumneck, Sallis, McAdams, and Newport.

Madison County—all of the county except the Ridgeland precinct.

The remaining Congressional District boundaries are to be drawn with the assistance of the parties, with the following directions from the court:

1. Minimize the deviation and variation between all districts.

2. Preserve incumbent representatives where possible.

3. Maximize the black population in District 4 under the following two guidelines:

(1) Create relatively regular district lines.

(2) Maintain areas of common interest within the same Congressional Districts.

The court does not have access to the expertise that the parties have immediate access to in the form of demographers and actual precinct populations by race. It is the court's best estimate, based upon the information that it does have, that the total population of District 2 will be 503,831 persons; that the total black population of that district will be approximately 57.8 percent; and that the total voting age black population of that district will be approximately 52.9 percent.

ADDENDUM "B"

The boundaries of all counties, supervisors' districts, and precincts listed below shall be such boundaries as they existed on July 1, 1981 (*see* 541 F.Supp. 1135 at 1145, N.D. Miss. 1982), with the exception of the supervisors' districts and precincts of Jones County. Jones County supervisors' districts and precincts referred to are those defined and incorporated in the Consent Judgment entered on October 26, 1983, by the United States District Court for the Southern District of Mississippi in Cause No. 8-83-0200(R) styled Jones County Branch, NAACP v. Jones County, Mississippi.

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Chickasaw	Marshall	Tate	Yalobusha
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together with the following parts of counties:

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Grenada			

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Kemper	Neshoba		

together with the following parts of counties:

Attala County	All except for the precincts of McAdam, Newport, Sallis, Shrock, and Possumneck:
Choctaw County	The Panhandle precincts:
Jones County	All new precincts located in new Supervisors Districts Nos. 1, 2, and 5:
	The new Blackwell Precinct in new Supervisors' District No. 4; and
	All of new Supervisors' District 3 except the new precincts of Glade, Ovett, and Tuckers:
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Rankin County	All except for the precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star.

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Amite	Jeff. Davis	Marion	Walthall
Copiah	Lawrence	Pike	Wilkinson
Covington			

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George	Harrison	Pearl River	Stone
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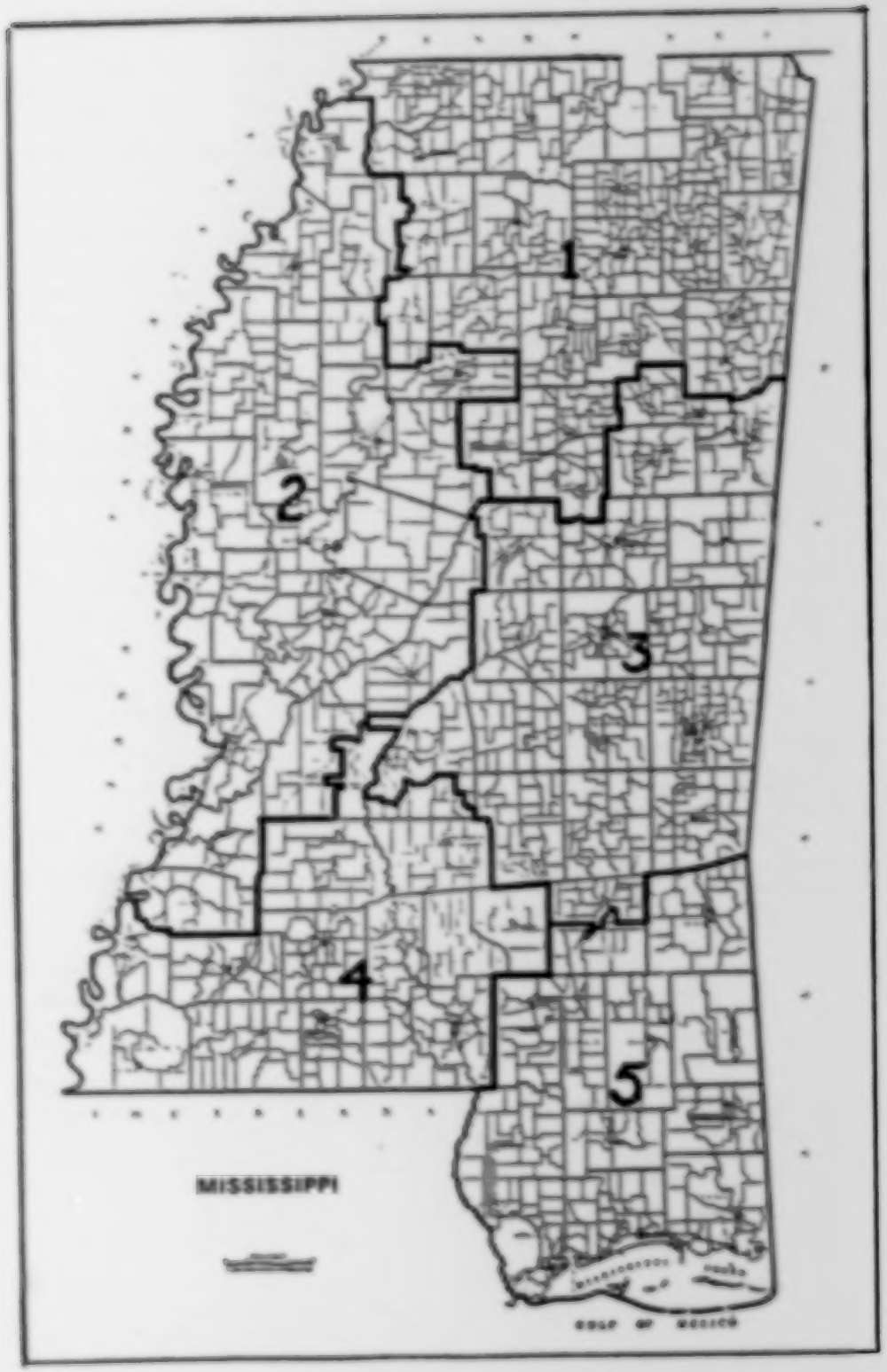
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The statistics for each of the five congressional districts defined above are as follows:

Congressional District	Total Population	Percent Variance from the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	% Black VAP
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2	594,024	—.0096%	296,888	58.30%	322,719	176,491	52.89%
3	594,242	+.0026%	161,719	32.07%	348,124	99,479	28.26%
4	594,187	+.0117%	211,714	41.99%	346,979	129,618	37.42%
5	594,168	—.0049%	95,898	19.01%	342,754	57,048	16.65%

Maximum Range .0432



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APPENDIX C

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC82-80-WK-0

DAVID JORDAN, *et al.*,
Plaintiffs,

vs.

WILLIAM WINTER, *et al.*,
Defendants.

No. GC82-81-WK-0

OWEN H. BROOKS, *et al.*,
Plaintiffs,

vs.

WILLIAM F. WINTER, *et al.*,
Defendants.

[Filed Feb. 15, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Owen H. Brooks, Thomas Morris, Samuel McCray, Robert L. Jackson, and Rev. Carl Brown, plaintiffs in *Brooks* v. *Winter*, Civil No. GC-82-81-WK-0, hereby appeal to the Supreme Court of the United States from the Final Judgment entered in this action on January 6, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Frank R. Parker
FRANK R. PARKER
WILLIAM L. ROBINSON
PATRICIA M. HANRAHAN
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Attorneys for *Brooks* Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed, postage prepaid, a copy of Brooks Plaintiffs' Notice of Appeal to the Supreme Court of the United States to the following counsel:

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Mississippi Republican Executive Committee
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This the 13th day of February, 1984.

/s/ Frank R. Parker
FRANK R. PARKER

MOTION

Office - Supreme Court, U.S
FILED
JUN 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*,
Appellees.

**On Appeal From The United States District Court
For The Northern District Of Mississippi**

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1865

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*, *Appellees.*

On Appeal From The United States District Court For The Northern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

Appellees Bill Allain, as Governor of the State of Mississippi; Edwin Lloyd Pittman, as Attorney General of Mississippi; and Dick Molpus, as Secretary of State of Mississippi, in their official capacities as members of the Mississippi State Board of Election Commissioners, respectfully move the Court to dismiss the direct appeal by appellants Owen H. Brooks, et al., or, alternatively, to affirm the judgment below on the ground that it is manifest that the questions presented in the appellants' Jurisdictional Statement are so unsubstantial as not to need further argument.

In filing this Motion to Dismiss or Affirm, the state official appellees do not waive, and expressly reserve, their right to file a Jurisdictional Statement on Cross-Appeal as authorized by Sup. Ct. R. 12.4.

STATEMENT OF THE CASE

The detailed history of this litigation and other litigation concerning congressional redistricting in Mississippi is recounted in detail in the following published opinions, *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967); *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vacated and remanded sub nom. Brooks* v. *Winter*, 103 S. Ct. 2077 (1983); and *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dismissed*, 103 S. Ct. 1888 (1983), and the district court's unpublished opinion of April 16, 1984, J.S. App. A at 1a-21a. For purposes of this motion, this detailed history may be summarized as follows.

In 1982, the district court adopted and ordered into effect for the 1982 congressional elections an interim, court-ordered congressional redistricting plan for Mississippi's five congressional districts. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court). This 1982 court-ordered plan, commonly referred to as the Simpson Plan, contained two congressional districts with significant black populations: The Second Congressional District which was 53.77% black in its total population and the Fourth Congressional District which was 45.25% black in its total population. 541 F. Supp. at 1141. Both the black plaintiffs and the state official defendants appealed from the district court's June 8, 1982, judgment adopting and implementing the Simpson Plan, and this Court, after inviting and receiving the Solicitor General's views by written brief, summarily vacated the district court's judgment and remanded this case to the district court "for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended in 1982." *Brooks* v. *Winter*, 103 S. Ct. 2077 (1983).

On remand, the district court conducted a two and one-half day trial on December 19-21, 1983, during which it received into evidence additional oral testimony and documentary evidence, including numerous evidentiary depositions. Much of the proof at the trial on remand concerned the 1982 general election contest in the Second Congressional District which was won by a margin of less than 3,000 votes by the white Republican nominee over the black Democratic party nominee, veteran state representative Robert Clark. The proof offered by the parties was in sharp dispute concerning whether the Simpson Plan violated Section 2. Further, there was conflicting proof as to what level of black population in the Second Congressional District was necessary in order to give black voters an equal opportunity to participate in the political processes and to elect candidates of their choice. Based upon all the evidence on remand, as well as the proof presented at the May, 1982, trial, the district court concluded that the Simpson Plan violated Section 2 particularly as to the structure of the Second Congressional District and adopted and implemented for the 1984 congressional election a new court-ordered redistricting plan. J.S. App. B 1a-30a. The new court-ordered plan modified the configuration of the Second Congressional District to yield a new Second Congressional District which is 58.3% black in its total population and 52.83% black in its voting age population. The new Fourth Congressional District is now 41.99% black in its total population and 37.42% black in its voting age population. In support of its January 6, 1984, judgment, the district court filed a written, unpublished opinion on remand which is found at J.S. App. A at 1a-21a.

From the district court's January 6, 1984, final judgment adopting and implementing the new congressional redistricting plan, the Mississippi Republican Executive

Committee has prosecuted an appeal to this Court challenging the correctness of the district court's conclusion that the Simpson Plan violated Section 2, *Mississippi Republican Executive Committee* v. *Brooks*, No. 83-1722. The Republican Executive Committee has also questioned the applicability of Section 2 to this proceeding as well as the constitutionality of the amended provision. The Brooks plaintiffs have prosecuted the instant appeal which challenges only the adequacy of the remedy fashioned by the district court. *Brooks* v. *Allain*, No. 83-1865. By separate jurisdictional statement on cross-appeal, the state official appellees have cross-appealed from the district court's judgment and challenged the correctness of the district court's conclusion that the Simpson Plan violated Section 2.

THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTIONS

Because the questions presented in the Jurisdictional Statement filed by the appellants are so unsubstantial as not to merit further argument before this Court, the Court should dismiss the direct appeal, or alternatively, affirm the judgment below on the direct appeal.

The appellants are not satisfied with the remedy fashioned by the district court to cure the Section 2 violation which it found.[1] A careful review of the Jurisdictional Statement, the district court's opinion, and the pertinent legal principles establishes that the appellants want this

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[1] The appellants flatly state that "all parties now concede that there was a violation" of Section 2. J.S. at 13. The obvious error of this pronouncement is evidenced by the Jurisdictional Statement filed by the Mississippi Republican Executive Committee, No. 83-1722 and the Jurisdictional Statement on Cross-Appeal filed by William A. Allain, *et al.* in which those defendants below challenge the finding of a violation of Section 2.

Court to do nothing less than review the entire record before the district court, reweigh and reevaluate the evidence, including the credibility of witnesses, and to substitute the plaintiffs' expectations of the racial composition of a congressional district for that carefully selected by the district court based upon the totality of the circumstances before it. Clearly, this is not this Court's function, and the questions so presented by the appellants are completely unsubstantial and merit no further argument before this Court.

The starting point for considering the unsubstantiality of the questions presented in the Jurisdictional Statement is a review of that portion of the district court's opinion which explained in detail its reasoning in fashioning the new congressional redistricting plan. In pertinent part, the district court stated:

> **IV.** ***The Court-Ordered Interim Plan***
>
> In devising a plan to replace our prior plan for the impending election, we recognized the obligation to: (1) achieve the least possible deviation from the one person, one vote ideal, *Chapman* v. *Meier*, 420 U.S. 1, 26-27, 95 S.Ct. 751, 765-55 (1975); (2) design a plan that is not racially discriminatory in either purpose or effect, *McDaniel* v. *Sanchez*, 452 U.S. 130, 148, 101 S.Ct. 2224, 2235 (1981); and (3) adhere to the state's policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act, *Upham* v. *Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 1520-21 (1982).

The plan ordered into effect by our final judgment of January 6, 1984, meets these requirements. The statistics of that plan are set out below.

Congressional District	Total Population	Percent Variance From the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	% Black VAP
1	504,077	—.0101%	124,136	24.63%	346,074	74,165	21.43%
2	504,024	—.0206%	256,638	50.93%	322,719	170,491	52.83%
3	504,242	+.0228%	161,710	32.07%	348,524	96,478	26.26%
4	504,187	+.0117%	211,714	41.99%	346,370	129,618	37.42%
5	504,108	—.0040%	95,808	19.01%	342,754	57,068	16.65%

Range .0442

The interim plan was constructed under these criteria: create a rural Delta-River area district with a black voting age population majority; achieve minimal deviation from the ideal population per congressional district of 504,128; create districts containing voters with similar interests; preserve the electoral base of incumbents; and comply with the legislative goal of achieving high impact districts without splintering cohesive black populations.

We recognize that the creation of a Delta district with a majority black voting age population implicates difficult issues concerning the fair allocation of political power. *See* A. Howard & B. Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). Although the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), can come into tension with Congress' disclaimer in amended § 2 of any right to proportional representation, the plan we have adopted fully rectifies the dilution of black voting strength in the Second District and satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi.

The court rejected alternative plans offered by plaintiffs which would achieve a significantly higher black voting age population (approximately 60%) in

the Second District. Plaintiffs argue that a black voting age population of such preponderance is required for blacks to elect representatives of their choice. Amended § 2, however, does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process. In commenting upon the § 2 amendment, Senator Dole, a leading sponsor of the compromise legislation, stated: "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." Senate Report at 193. *In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections. Credible expert testimony received in this case supports this conclusion.* Additionally, plaintiffs' plans are an obvious racial gerrymander which would bring into the Second District overwhelmingly black sections of the City of Jackson and its suburbs; these inner-city, metropolitan areas have little in common with the interests of the predominantly rural Delta region. Also, plaintiffs' plans unnecessarily dilute black voting strength in the Fourth District. The Fourth District presently has a black population of 45.25%. The evidence presented indicates this is a factor in making the Fourth District representative reasonably receptive and sensitive to the needs of the black community. The plan adopted necessarily reduces he black population of the Fourth District to 41.99%. To further reduce the black population in the Fourth District to 33.7 or 33.83% as proposed by plaintiffs (541 F. Supp. at 1140) would diminish the impact of black voters in that district. Although the plans proposed by plaintiffs would probably insure the election of a black congressman in the Second District, the attempt to gain this election guaranty, which

§ 2(b) expressly disclaims, would have a certain adverse effect on the impact of the black voters in the Fourth District. Because of these considerations, we conclude that a black voting age population majority of 52.83% achieved under the court's plan will remedy the defect we now perceive in the Simpson Plan under the amended § 2.

We are cognizant that our court-ordered interim plan does not provide a compact geographical configuration for the Second District. However, it consists of rural Delta and river counties with similarities of interest; avoids gerrymandering a substantial portion of metropolitan Jackson into a district with these rural or farm counties; and yields the least adverse impact on the black voting influence in the Fourth District.

J.S. App. A at 12a-15a (emphasis added).

I. The District Court Correctly Applied Governing Legal Remedial Principles To Contradictory Proof.

Contrary to the appellants' assertion, J.S. at 13-17, the district court correctly applied governing legal remedial principles in fashioning its new court-ordered plan. Both the district court's original opinion, *Jordan* v. *Winter*, 541 F.Supp, 1135 (N.D. Miss. 1982) (three-judge court), and its opinion on remand, J.S. App. A at 1a-21a, evidence careful adherence to the governing legal principles for a court-ordered redistricting plan established by Supreme Court case law, *see, e.g., Upham* v. *Seamon*, 456 U.S. 37 (1982); *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Chapman* v. *Meier*, 420 U.S. 1 (1975). The appellants' argument to the contrary is premised upon their own yardstick for judging the acceptability of a congressional redistricting plan: The skin color of the person elected from a given district and a firm expectation of proportional racial representation in the Mississippi Congressional delegation.

This yardstick is not expressed in writing in any papers which are filed with any court. However, it is expressed by the plaintiffs in so many words in the testimony before the district court in this case, *e.g.*, T.270 (testimony of named plaintiff David Jordan: plaintiffs want Second Congressional District to integrate Mississippi Congressional delegation; blacks are "entitled" to 2 of the 5 seats in the Mississippi Congressional delegation); Ex. P. D-38A, v. 2, p. 42 (testimony of named plaintiff Owen H. Brooks: at least 2 out of the 5 members of the delegation should be black); Ex. P-24, p. 21 (testimony of named plaintiff Thomas Morris: "only a black can represent a black as well as a black could represent himself").

Despite the frequency of the plaintiffs' demand for a safe district they can proffer no legal support for the legitimacy of this demand. Indeed, the language of Section 2 clearly states and the courts have clearly held that Section 2 does not create a right to proportional representation. *See, e.g., Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984). Neither is there any entitlement to elect a member of one's own race. *Seamon* v. *Upham*, No. P-81-49 C.A. (E.D. Tex. Jan. 30, 1984). The appellants have erroneously interpreted the right to an equal opportunity to elect candidates of their choice to mean the right to a district with a black majority large enough to guarantee election of a black if bloc voting by blacks prevails.

The appellants assert that the proof overwhelmingly established that a district which is 65% black in its total population and 60% black in its voting age population is necessary in order for blacks to have an equal opportunity to participate in the political process and elect candidates of their choice. This is simply not so. The proof before the district court was divergent and conflicting on this point. While there were some expert testimony that a 65% district was needed, J.S. at 9, other expert opinion

offered by the plaintiffs stated that a district that was 60% black in its total population was sufficient to give black voters equal access to the political process in the Second District, T. 41-42 (testimony of plaintiffs' expert, William P. O'Hare). Further, the defendants' expert, Dr. Thomas Hofeller, testified that adding another two percentage points to the existing total population figure (53.77%) in the Simpson Plan Second Congressional District was sufficient, T. 410.[2] In addition to this opinion testimony, the district court had before it extensive proof of blacks' having been elected in districts (or having carried particular counties) which had significantly less than a 65% black total population. *E.g.*, Bolivar county: 40% black voting age population (VAP), Ex.P.-24, p. 35 (testimony of named plaintiff Thomas Morris); Leflore County: 59.13% black total population (T. Pop.)/54.23% black VAP, T. 255 (testimony of named plaintiff, David Jordan) and May, 1982 Ex. C-1, Binder 1, Attachment C (1980 census data); Quitman County: 55.98% black T. Pop./ 49.80% black VAP, Ex. P-25, v. 1, pp. 104-05 (testimony of named plaintiff Samuel McCray) and May, 1982 Ex. C-1, Binder 1, Attachment C; Washington County: 53.56% black T. Pop./47.62% black VAP, 55.59% black T. Pop./50.14% black VAP, 59.43% T. Pop./53.95% black VAP, Ex. D-38A, v. 1, pp. 27-29 (testimony of named plaintiff Owen H. Brooks) and May, 1982 Ex. C-1, Binder 1, Attachment C.

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[2] The appellants note in their Jurisdictional Statement that Dr. Hofeller "admitted" to having testified in *Ketchum* v. *Byrne* that a 58% black population would not constitute a viable black ward. J.S. at 17, n.9. In fact, Dr. Hofeller vigorously disagreed with the notion that what is necessary to afford equal access in one jurisdiction is also necessary in another. T. 469. The peculiar circumstances of the Chicago ward system, which have no bearing on Mississippi Congressional districting, influenced his opinion in *Ketchum*.

The district court also had before it the 1982 election results. In that general election, the Democratic Party nominee for the Second Congressional District seat in the United States House of Representatives, veteran state representative Robert Clark, a black, lost the general election to the white Republican nominee by less than 3,000 votes.[3]

Thus, in arriving at a Second Congressional District in which 58.3% of the total population was black and 52.83% of the voting age population was black, the district court had to exercise its judgment based upon the totality of the circumstances and based upon sharply conflicting proof which necessitated credibility choices in expert opinion testimony.

The appellants' assertion that the district court disregarded this Court's decision in *United Jewish Organizations* v. *Carey*. 430 U.S. 144 (1977), J.S. at 15, is patently without merit. The district court explicitly recognized the *UJO* decision, J.S. App. A at 13a. However, nothing in *UJO* mandated that the district court create a district which was 65% black based upon the totality of the circumstances as they existed in the instant case.

Based then on the conflicting proof at trial and a review of the district court opinion, it is apparent that the court below did not misapply remedial principles in creating the new court-ordered plan.

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[3] It is also significant to note that another of the appellants' experts, Henry J. Kirksey, testified that he had commented during the November 1982 election that black voters were in a bind because a victory for black Representative Clark in the 53% black Second District would "lose the argument we've made all these years that we need a 65% black population . . . to have a realistic chance of winning." T. 175.

II. The 1984 Primary Election Results Support The Conclusion That The New Court-Ordered Plan Does Remedy The Adjudicated Section 2 Violation.

On June 5, 1984, the district court's new court-ordered congressional redistricting plan was utilized for conducting the party primary elections for nomination for United States representatives in Mississippi. In the Second Congressional District, black veteran State Representative Robert Clark again won the Democratic nomination by easily defeating (with over 62% of the vote) a white opponent and two other black opponents who are elected officials in the State of Mississippi, Robert Gray, Mayor of the Town of Shelby in Bolivar County and Evan Doss, the Claiborne County Tax Assessor/Collector. Mr. Clark will now face the incumbent Republican in the November, 1984 general election. Jackson *Clarion-Ledger* at 1A & 9A (June 6, 1984). These results further support the district court's conclusion that the new court-ordered plan affords black voters an equal opportunity to participate in the political processes and to elect candidates of their choice.

III. The District Court's Plan Does Not Offend The Strict Guidelines Established For Court-Ordered Plans By This Court In *Connor* v. *Finch*.

While it is true that court-ordered redistricting plans are judged by stricter standards than those enacted by legislatures, there is nothing in the district court's opinion which substantiates the appellants' claim that the district court has violated the guidelines established by *Connor* v. *Finch*, 431 U.S. 407 (1977). Upon disputed proof, the district court determined that the Second Congressional District which it created assured blacks equal access to the political process. The appellants' complaint that the size of the Second Congressional District inhibits campaigning by black candidates is totally contradicted

by the 1982 campaign of State Representative Robert Clark and the 1984 primary election campaign in the Second Congressional District involving three black candidates, including State Representative Clark.

While the appellants criticize the district court's plan for allegedly "cracking" black population concentrations, what the appellants want the district court to do is to "pack" every remotely contiguous black concentration into the Delta merely for the purpose of achieving a 65% figure. The district drawn by the court accomplishes two important objectives. First, it preserves intact the Mississippi Delta region thus creating a district in which rural interests and concerns are shared by the entire constituency.[4] Secondly, the district court's configuration leaves the City of Jackson in the Fourth district thereby maintaining the black population in that district at over 40%.[5] The appellants' 65% plan places the City of Jackson in the otherwise rural Second District, a drastic step which not only destroys the community of interest in the Second District but guts the Fourth District of black political influence. Based upon the disputed proof before

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[4] In the May 1982 proceeding, the appellants vigorously opposed S.B. 2001 because it did not preserve a purely rural Delta district. The appellants there stressed the historical precedent for a Delta district. At one time, the Delta contained an overwhelming black majority. Demographic shifts during the past two decades have greatly reduced the black population percentage in many Delta counties. The concept of a purely "Delta" black district is a phantom—it no longer exists. This phantom, however, lies at the root of the appellants' contention that the court's Delta District should reach into the State's largest city to select black neighborhoods in order to bolster the black percentage of the District.

[5] There is no consensus as to whether two impact or influence districts or one overwhelming majority district best serves the interests of racial minorities. Here, the court opted for one voting age majority district and one strong impact district. *See Terrazas* v. *Clements*, 581 F. Supp. 1329 (N.D.Tex. 1984).

it, the district court properly decided that this extreme measure was not needed to provide equal access to the political process.

CONCLUSION

For these reasons, the state official appellees respectfully submit that the questions presented in the jurisdictional statement are so unsubstantial as not to need further argument before this Court.

Therefore, the Court should dismiss this direct appeal, or in the alternative, affirm the judgment entered by the United States District Court for the Northern District of Mississippi.

Respectfully submitted,

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BRIEF

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No. 83-1865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OWEN H. BROOKS, et al., Appellants

v.

BILL ALLAIN, Governor of Mississippi, et al., Appellees

On Appeal From The United States District Court For The Northern District Of Mississippi

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MEMORANDUM OF THE APPELLEES, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, IN OPPOSITION TO JURISDICTIONAL STATEMENT

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MEMORANDUM OF THE APPELLEES, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, IN OPPOSITION TO JURISDICTIONAL STATEMENT

The Mississippi Republican Executive Committee, Appellees herein, have filed their own Jurisdictional Statement appealing the Judgment of the United States District Court for the Northern District of Mississippi in *Mississippi Republican Executive Committee v. Brooks*, No. 83-1722. Because they feel that the Judgment below is erroneous in its entirety, they cannot move to affirm that Judgment, as permitted by this Court's Rule 16.1(c), even though they believe the questions presented by the Jurisdictional Statement of the Brooks Plaintiffs "are so unsubstantial as not to need further argument." Cognizant that this Court does not ordinarily receive motions to dismiss an appeal from a federal court, and upon advice of the Clerk, the Republican Defendants submit this Memorandum to convey their position that the Court should not entertain oral argument in No. 83-1865, should note probable jurisdiction in No. 83-1722, and should reverse the judgment of the District Court.

STATEMENT OF THE CASE

The Republican Defendants have set out their statement of the case in some detail in their Jurisdictional Statement at 4-6, *Mississippi Republican Executive Committee v. Brooks* No. 83-1722 [hereinafter cited as Republican J. S.]. Because the Brooks Plaintiffs have raised the issue of remedy in their Jurisdictional Statement, it is necessary here to call a few additional facts to the Court's attention.

The Brooks Plaintiffs strongly imply that they are asking this Court to recreate a Congressional District located in the Delta with a black population of 65% or greater. J. S. at 3-5 & nn.1 & 4, 8-10 & nn.6 & 7. The record clearly reflects that it is impossible to create a Delta district which is 65% black. Since the last such district existed in 1960, J. S. at 3 n.1, the population has shifted so that it is now possible to create either a Delta district or a 65% black district, but not both. As the Brooks Plaintiffs' expert testified, "[I]t becomes readily obvious that there is a limit to the number of blacks that you can incorporate in a small delta district if you restrict yourself to the traditional delta counties, that is to say, not including Jefferson and Clayborn [*sic*], and excluding Hinds County." Tr. 124. Excluding those counties, the maximum attainable black voting age population would be about 50.9%. Tr. 125.

The plans containing black majorities of 64.35% and 63.60%, described by the Brooks Plaintiffs as being "in the Delta area," J.S. at 10, in fact both contain a portion of the City of Jackson, as well as other parts of Hinds County. Tr. 163-66. Hinds County has never been considered to be "in the delta area," as counsel for the Brooks Plaintiffs clearly recognized at trial. Tr. 163. See also J. S. at 3a n.3.

The Brooks Plaintiffs properly note that the trial court was reluctant to "combine urban areas of the city of Jackson with the rural Delta area." J. S. at 10. They imply, however, that the Court brought some urban areas into the Second District by adding "portions of the Jackson suburbs in Hinds County." *Id.* at 11. However, their witness Henry Kirksey testified at trial that these portions of Hinds County are clearly rural:

> Q How would you compare life in those rural precincts outside of Jackson generally with life in the delta area?
>
> A I find personally Mr. Parker — and I don't claim to be an expert in this area — but I find that the basic difference in the rural in the Fourth Congressional District here is we're talking about large plantations up here versus smaller farms down in the Fourth Congressional District.

Tr. 163. It should also be noted that the District Court's plan, like all previous Mississippi Congressional districting plans, does not split any municipalities.

THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION

This appeal presents only the question of the standards to be applied by a district court in devising a remedy for a districting plan found to violate Section 2 of the Voting Rights Act, 42 U.S.C. §1973. If this Court agrees with the Republican Defendants that the District Court erred in finding a violation of Section 2, then this appeal presents no question at all. The Republican Defendants submit that the District Court's findings of fact are clearly erroneous and that it applied an improper interpretation of Section 2.

Even if Section 2 has been violated, the Brooks Plaintiffs are not entitled to the additional relief they seek. Their argument is that the District Court's remedial plan is insufficiently race-conscious. This Court has never approved a race-conscious remedy in a voting case; Section 2 does not require it, and the Fourteenth Amendment forbids it.[1]

[1] The Jurisdictional Statement previously filed by the Republican Defendants does not attack the propriety of the remedy. Republican J. S. at 26-27 n.15. If this Court agrees with our substantive arguments, then the proper course is to reverse the Judgment of the District Court and direct the reinstatement of either the 1981 legislative plan or the 1982 court plan. *Id.*, at 6. If this Court rejects those arguments, but agrees that a race-conscious remedy is inappropriate, then the proper course is to reverse the Judgment and direct the

I. THE DISTRICT COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS.

The Brooks' Plaintiffs are not entitled to the further relief they seek on their appeal because the District Court's factual findings, necessary to support its conclusion that Section 2 had been violated, are clearly erroneous. The Republican Defendants recognize that Federal Rule of Civil Procedure 52(a) places a heavy burden upon them to support this contention. Certainly, the ultimate finding in this case is "a so-called 'constitutional fact,' " *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, 52 U.S.L.W. 4513, 4522 (U.S. Apr. 30, 1984)

entry of a remedy which is not race-conscious.

The Republican Defendants, however, do not seek that result. Should this Court decline to reinstate either the 1981 plan or the 1982 plan, they will acquiesce in the retention of the 1984 plan, rather than subject the voters of Mississippi to even further disruption. They raise the impermissibility of the District Court's remedy only for the purpose of resisting the imposition of an even more drastic remedy.

Ordinarily, a respondent or an appellee is "entitled under our precedents to urge any grounds which would lend support to the judgment below." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). However, there are apparently some cases in which a party has been "barred from presenting an argument which would have supported the judgment in his favor because its logic would have led to the entry of a judgment which went further in his direction." R. Stern & E. Gressman, *Supreme Court Practice* §6.33 at 480 (5th ed. 1978). The Court since has indicated that this is a matter of discretion rather than jurisdiction. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1978). This discretion should be even more readily available in this case, because an appeal "brings the 'whole case' before the Court. Thus, issues that might provide alternative grounds for support of the District Court judgment can be considered by this Court even though not specifically presented by cross-appeal." *Fusari v. Steinberg*, 419 U.S. 379, 387-88 n.13 (1975).

Thus, the Republican Defendants submit that this Court is free to consider their attack on the propriety of the District Court's remedy, even though it has not been presented in their Jurisdictional Statement or by a cross-appeal in this case. If this Court should conclude that it lacks such discretion, then this Memorandum should be treated as a Jurisdictional Statement on Cross-Appeal, as permitted by this Court's Rule 12.4, for the purpose of resolving this single issue. The additional material required by Rule 15 has already been submitted to this Court in the Jurisdictional Statement in No. 83-1722.

(Rehnquist, J., dissenting), but we do not ask this Court to undertake the sort of hypercritical examination of the record which the Court performed in that case. That is the sort of analysis undertaken by the plurality in *City of Mobile v. Bolden* 446 U.S. 55 (1980), which we concede that Congress intended to disapprove by its amendment to Section 2. Republican J. S. at 22. Even under the traditional standard, however, we believe that the record fails to support the District Court's findings.

The District Court first noted, "That Mississippi has a long history of de jure and de facto race discrimination is not contested." J. S. at 8a. That is because it was not pled, except for "intentional racial discrimination in Mississippi congressional redistricting since 1966." Brooks' Plaintiffs Objections to the Simpson Plan ¶7. That allegation was not and could not have been established, in the face of this Court's judgment in *Connor v. Johnson*, 386 U.S. 483 (1967), rejecting a constitutional attack on Mississippi's redistricting plan. While the evidence of the other forms of discrimination found by the Court to have existed was admissible as circumstantial evidence in support of the one form of discrimination pled by the Brooks Plaintiffs, the Defendants had no way of knowing that the Court would apply that evidence to establish other allegations not pled. Therefore, they were deprived of the opportunity to make a record on those allegations. The District Court's use of evidence to establish allegations not pled is analogous to an appellate court's affirmance of a judgment on a theory not argued below; it should only be done where "the opposing party is not denied an opportunity to respond to the new theory." *Herm v. Stafford* 663 F.2d 669, 684 (6th Cir. 1981). The Republican Defendants have had no opportunity to respond to the District Court's new theory, which they did not even receive until after they had filed their own Jurisdictional Statement.

The District Court's theory is "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." J. S. at 9a. While low black turnout was not pled by the Brooks Plaintiffs, they did at least allege that the Second District was "majority white in registered voters." Brooks' Plaintiffs Objections to the Simpson Plan ¶4.

Their own expert testified that there was no official voter registration data and that the best he could do was to make estimates. Tr. 101-03. The State Defendants' expert told counsel for the Brooks Plaintiffs that the actual relation between black and white registration could not be precisely determined:

> ... I think that you also have to remember the error for the black voter registration is greater than the error for the white registration. And there is an equal chance that the white and black registration are equal, just as much as there's an equal chance that they are wider. You can't always assume that the error breaks the wrong way.

Tr. 458. While the District Court's finding of low black registration may be a reasonable speculation, there is no substantial evidence in the record to support it. With regard to black turnout, the evidence is equally insubstantial. The Brooks Plaintiffs actually found that black turnout in the Democratic primary exceeded white turnout on a percentage basis. Ex. P-76 at 16. It is true that white turnout exceeded black in the general election, *id.*, at 9, but the evidence shows that some black leaders, including the Brooks Plaintiffs' witness Henry Kirksey, did not actively campaign for the Democratic nominee. Tr. 177-78. Certainly, this sort of contradictory evidence on an issue not pled is insufficient to support the Court's factual findings.

The Brooks Plaintiffs likewise failed to plead the existence of "socio-economic disparities between blacks and whites in the Delta area and the state as a whole." J. S. at 9a. The Court found this "probative of minorities' unequal access to the political process in Mississippi," on the basis of a footnote in the Senate Committee Report: "Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.114 (1982) [hereinafter cited as Senate Report]. Because the District Court's finding that "the level of black participation in politics is depressed" is clearly erroneous, the evidence of socio-economic disparities is irrelevant to this case.

The Court further found, "Plaintiffs have established that voters in Mississippi have previously voted and continue to vote on the basis of the race of candidates for elective office." J. S. at 10a. With regard to previous elections, this finding is absolutely unsupported by the record. The Plaintiffs introduced no evidence whatsoever of voting patterns in elections prior to 1982.[2] With regard to 1982, the Brooks Plaintiffs' evidence did not deal with Mississippi as a whole, but only with the Second District. Even there, almost 18% of whites in the general election voted for the black candidate, Ex. P-76 at 9, a far less polarized situation than that prevailing in such uncovered jurisdictions as Chicago, Illinois. Tr. 484-85. Indeed, the only striking polarization shown by the record was that exhibited by the class of black voters represented by the Brooks Plaintiffs, only 3.5% of whom voted for the white candidate at the general election. Ex. P-76 at 9.

The Court sought to bolster this finding of polarized voting by a perfunctory statement that it had been encouraged by "racial campaign tactics." J. S. at 12a. The Court noted, *id.*, at 12a n.8, that the Republican candidate's slogan was "He's one of us." The record reflects that the slogan had been adopted while the white Democratic incumbent was still in the race, Tr. 339, and that the Republican candidate had carried a banner bearing that slogan to a meeting of the Greenwood Voters League, a black organization which Plaintiff Jordan serves as President. Tr. 336. This hardly indicates an attempt to stir racial animosities. The Court also took exception to the following television commercial:

> There is a new Mississippi, a Mississippi of new jobs and new opportunities for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments]

[2] The Brooks Plaintiffs may attempt to rely upon mention of bloc voting in the stipulation from *Mississippi v. Smith*, 541 F. Supp. 1329 (D.D.C. 1982), appeal dismissed, ___ U.S. ___, 103 S. Ct. 1888 (1983). J. S. at 8 n.6. None of the Defendants in this case were parties to that case, it was admitted into evidence over their objection, and neither of the District Court's opinions in this case has given it any credence whatsoever. Cf. Republican J. S. at 7.

J. S. at 12a n.8. It is more reasonable to interpret this juxtaposition of images as an attempt to bridge the gap between blacks and whites in the Second District. Any finding that it was intended to widen that gap must be rejected as clearly erroneous.

On the basis of these clearly erroneous findings of subsidiary fact, the District Court reached its clearly erroneous finding of ultimate fact:

> We therefore find racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population. Since the Second District under the Simpson Plan does not have a majority black voting age population, the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice.

J. S. at 11a. The record clearly reflects that other factors, including the unwillingness of some black leaders to support the Democratic nominee, contributed to the inability of black voters to elect the candidate a majority of them preferred. The Brooks Plaintiffs' expert testified that, while blacks were disadvantaged by not having a majority of the voting age population, it was not impossible for their candidate to win an election in the Second District as then constituted. Tr. 148-51. The State Defendants' expert testified that a black candidate in the Second District would have a reasonable opportunity to be elected. Tr. 403-04.[3]

[3] Counsel for the Brooks Plaintiffs mischaracterizes his testimony by saying that equal access would exist only "so long as the white crossover voting rate reached at least the level which occurred in the 1982 general election." J. S. at 17 n.9. In fact, he testified that it would only be necessary for a black candidate to "receive a significant factor of the white vote." Tr. 463. The evidence in this case shows that to be entirely possible.

It should not be necessary to review each of these findings in detail. The districting plan found illegal by the District Court had been used only once. In the Democratic primary, a black candidate defeated white opponents, while in the Republican primary, a white candidate defeated a black opponent. When those victors faced each other in the general election, the white candidate won by only 2,000 votes. A more racially equal result, even if Section 2 requires that, can hardly be imagined. The clearly erroneous finding that equal access did not exist can only be explained by a conclusion that the law requires superior access for black voters. That conclusion is equally false.

II. THE DISTRICT COURT APPLIED AN IMPROPER LEGAL STANDARD IN CONCLUDING THAT SECTION 2 HAD BEEN VIOLATED.

Counsel for the Brooks Plaintiffs once again misrepresents the record in contending that "all parties now concede that there was a violation" of his clients' rights. J. S. at 13. The Jurisdictional Statement previously filed by the Republican Defendants in No. 83-1722 denies that there has been a violation of the Fourteenth Amendment, the Fifteenth Amendment, Section 2, or Section 5. It is not necessary to repeat those arguments here to demonstrate that the Brooks Plaintiffs are entitled to no further relief. It will, however, be useful to examine the contours of a Section 2 violation as they emerge, however murkily, from the District Court's opinion and the Brooks Plaintiffs' Jurisdictional Statement.

Neither the District Court nor the Brooks Plaintiffs take the trouble to define the nature of the rights conferred by Section 2. This makes it awkward to construct a remedy, for it is hard to restore a litigant to his rights without knowing what those rights are. Indeed, it is from examining the remedies favored by the District Court and the Brooks Plaintiffs, together with a few revealing comments from each, that one can best determine their concepts of the substantive rights protected by Section 2. The District Court apparently believes that black voters are entitled to an electoral advantage, but not to a guarantee of success; the Brooks Plaintiffs believe that they are entitled to a guarantee. Both are wrong.

The District Court's opinion nowhere precisely defines the rights which Section 2 confers upon voters. The Court did, however, find that circumstances in the Second District prevented "black voters from participating on an equal basis with white voters in electing representatives of their choice." J. S. at 11a. As a remedy, the Court concluded that "the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." *Id.*, at 14a. The Court reasoned, "Although the plans proposed by plaintiffs would probably insure the election of a black congressman in the Second District, the attempt to gain this election guaranty, which §2(b) expressly disclaims, would have a certain adverse effect upon the impact of black voters in the Fourth District." *Id.*, at 15a. Apparently, the District Court believed that Section 2 gives black voters a right to a slim electoral advantage wherever that is feasible, although the Court was clearly disturbed that in so doing it would disadvantage even further those blacks living outside the favored district.[4]

The Brooks Plaintiffs, on the other hand, seek to transform the "totality of the circumstances" test of Section 2 into an "all or nothing" test. They define a violation of Section 2 as the "discriminatory denial to minority voters of the opportunity 'to elect representatives of their choice.' " *Id.*, at 15. They object to the District Court's remedy because it fails "fully to provide" that opportunity. "In fact, the trial court rejected plaintiffs' proposed plans for the explicit that would 'probably insure the election of a black congressman.' " *Id.* In short, a court can "fully ... provide" protection of Section 2 rights only when its remedy would "probably insure the election of a black congressman." That this guarantee of success to the black voters

[4] The Court indicated as much in its opinion. "[R]acial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population." J. S. at 11a. Section 2, then, is violated unless 50% of the voting age population is black. By the Court's definition, the other four Mississippi districts now violate Section 2 more egregiously than before.

of one district may disadvantage the black voters of adjoining districts is no concern of Section 2. "This does not constitute a prohibited dilution of black voting strength where the adjoining district does not contain a black voting majority." *Id.*, at 17. Section 2 is satisfied only when black voters are capable of controlling an election; where black voters cannot constitute a majority, no matter how creative the gerrymander, the Brooks Plaintiffs' version of Section 2 provides no protection. In short, the Brooks Plaintiffs seek electoral apartheid; a court should create as many bantustans as possible, and ignore everyone outside their boundaries.

The Brooks Plaintiffs have even quantified the amount of advantage that they believe Section 2 guarantees them. "[A] district which is 65 percent black in population or 60 percent black in voting age population was necessary as a remedy to give black voters an equal opportunity to participate in the political process and to elect candidates of their choice." *Id.*, at 8. The Brooks Plaintiffs raised this contention on their last appeal, and the Justice Department properly rejected it. "The letter [objecting to the 1981 legislative plan] did not state, nor does the Attorney General maintain, that a 65% black district is required for purposes of Section 5 preclearance." Brief for the United States as Amicus Curiae at 12, *Brooks v. Winter*, ___ U.S. ___, 103 S.Ct. 2077 (1983). This is fully consistent with the testimony that the Justice Department had previously presented to Congress. As Assistant Attorney General Reynolds told the Senate Judiciary Committee, "In evaluating reapportionment or redistricting plans submitted under Section 5, ... we proceed on a case-by-case basis, in the light of all the facts, without imposing any rigid mathematical standards." Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 183 (1982) [hereinafter cited as Senate Hearings]. In the House, Representative Levitas of Georgia, who was then involved in litigation identical to this as a result of the Justice Department's refusal to preclear Georgia's redistricting plan, see *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem., ___ U.S. ___, 103 S.Ct. 809 (1983), asked whether the Act contained "any numerical percentage of what would constitute a minority district."

Chairman Edwards assured him that "the bill contains no such provision." 128 Cong. Rec. H3844 (daily ed. June 23, 1982). Nor has this Court ever imposed such a requirement. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), this Court permitted New York voluntarily to create legislative districts that were 65% black, but this Court has never held that a State or a district court is required to create such districts. Moreover, counsel for the Brooks Plaintiffs has misrepresented the District Court's decision by claiming that it holds "that Section 2 prohibits the creation of a 65 percent black district as a remedy for approving racial discrimination and redistricting." J. S. at 14. In fact, the District Court did no more than recognize the obvious fact that "the use of a race-conscious remedy for discrimination ... can come into tension with Congress' disclaimer in §2 of any right to proportional representation." *Id.*, at 13a. The District Court held only that Congress had not wished to mandate the guarantee of black success which the Brooks Plaintiffs desire.

Despite this clear history of rejection of the 65% standard, it remains necessary for this Court explicitly to repudiate it. Just last month, the Seventh Circuit reversed a district court for its failure to create 65% black districts. *Ketchum v. Byrne*, Nos. 83-2044, 83-2065 & 83-2126 (7th Cir. May 17, 1984). The Court found that the figure had been "either specifically adopted or tacitly approved" by many courts. Slip op. at 32. This requirement of a supermajority flows naturally from the Court's mistaken conception of minority rights: "[A]n effective majority means 'a majority of the population substantial enough to allow group choice to be effective.'" *Id.*, at 24 n.13. Thus, the Seventh Circuit provided the guarantee of success that the District Court in this case properly refused to give.

Perhaps the most honest and comprehensive summary of the emerging jurisprudence under amended Section 2 was given last month by Judge Wisdom for the Eleventh Circuit in *United States v. Marengo County Commission*, No. 81-7796, slip op. at 3146 (11th Cir. May 14, 1984):

> Some authorities suggest that a finding of discriminatory result is compelled when the plaintiffs show racially polarized voting combined with an absence of minority elected officials. ... Others have argued that discriminatory effect is irrebuttably established when these factors are combined with a history of discrimination and present socioeconomic disparities between the races. ... Certainly, when the plaintiffs establish these factors and no other factors weigh strongly against the plaintiffs' case, dilution must be found.

Most courts have faithfully parroted the long list of factors given in the Senate Report. See Republican J. S. at 20. Nevertheless, every single decided case, with the exception of *Upham v. Seamon*, Civ. No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), juris. statement filed sub nom. *Strake v. Seamon*, No. 83-1823 (U.S. May 9, 1984), is consistent with Judge Wisdom's summary.

Judge Wisdom's summary is inconsistent, however, with the legal analysis of *Chapman v. Nicholson*, 579 F. Supp. 1504 (N.D. Ala. 1984), and the entire legislative history of amended Section 2. The *Chapman* Court found that "the practical effect of the 1982 amendment is to return the court's inquiry in a statutorily-based vote dilution case to the *Zimmer* [*v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973),] criteria as they existed prior to the *Washington v. Davis* [, 426 U.S. 229 (1976),] and *Arlington Heights* [*v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977),] decisions." 579 F. Supp. at 1507.[5] This is clearly the most extreme reading of Section 2 which can be supported by the legislative history.[6] As counsel for the Brooks Plaintiffs told the Senate Judiciary Committee, "The

[5] The result in *Chapman*, however, is consistent with Judge Wisdom's formulation because the Court found insufficient evidence of past discrimination or polarized voting. 579 F. Supp. at 1513. Whether these findings can survive appellate review is problematical. See *Marengo County*, slip op. at 3138-40.

[6] A somewhat less extreme reading is that Congress intended to impose the same substantive standard as in Section 5. Indeed, that is all the plaintiffs sought in *City of Mobile*. "[T]he standard for judging election practices is the same under section 2 as under section 5 ...." Brief for Appellees at 16, *City of Mobile*. If this Court adopts that reading of Section 2, the District Court's 1982 Order should be reinstated. Republican J. S. at 10-12.

amendment restores the original intent of Congress and would also restore the legal standard applied by the courts prior to the *Mobile* decision." Senate Hearings at 1183 (testimony of Frank Parker). Nevertheless, the Fifth Circuit has rejected *Zimmer* and fashioned a new test out of the Senate Report. *Jones v. City of Lubbock*, 727 F.2d 364, 383-86, reh. en banc denied, 730 F.2d 233 (5th Cir. 1984). Most importantly, that Court noted that "Congress has articulated as an objective factor an evidentiary issue -- polarized voting -- that this Court's pre-*Bolden* cases had not treated as a matter of primary importance." 727 F.2d at 384. See generally 730 F.2d at 233-36 (Higginbotham, J., concurring).

The elevation of polarized voting to such importance has meant, again contrary to the assurances of counsel for the Brooks Plaintiffs, that the amended Section 2 will "ensure near certain victory for minority voters." Senate Hearings at 1184 (testimony of Frank Parker). Indeed, three of the Justices of this Court have recognized, "Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare ...." *United Jewish Organizations*, 430 U.S. at 166 (Opinion of White, J.). Two of the other factors cited by Judge Wisdom, "a history of discrimination and present socio-economic disparities between the races," *Marengo County*, slip op. at 3146, are likewise not rare.[7] Indeed, unless this Court finds that such factors are present on a nationwide basis, it should hold Section 2 unconstitutional. Republican J. S. at 24 & n.13.

[7] The continually expanding theory of dilution is illustrated by the efforts of the plaintiffs in *City of Mobile* to downplay the importance of past discrimination. "No decision of this Court suggests that multi-member districts should be struck down wherever there is a recent history of discrimination in voting ...." Brief for Appellees at 45 n.27, *City of Mobile*. This statement remains true today.

Of Judge Wisdom's four factors, then, the only one which might not be found almost everywhere is "an absence of minority elected officials." *Marengo County*, slip op. at 3146. Yet this is exactly the factor which Section 2(b) says is not sufficient by itself to establish a violation. In short, if this Court approves the emerging jurisprudence under Section 2, it will enshrine exactly what the President thought he had forestalled in agreeing to the compromise version of Section 2. See Remarks on Signing H.R. 3112 into Law, 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982).

Judge Wisdom's assurance that a violation might not be found where "other factors weigh strongly against the plaintiffs' case," *Marengo County*, slip op. at 3146, rings hollow in light of the actual disposition of that case. The District Court's finding that the absence of elected black officials was due to voter apathy was deemed clearly erroneous. *Id.*, at 3139-40. The District Court's finding that local authorities were not unresponsive to black needs was likewise found clearly erroneous. *Id.*, at 3144-45. The Fifth Circuit was somewhat less abrupt in *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. Mar. 2, 1984), merely reversing the defendants' verdict because of insufficiently detailed findings of fact. Slip op. at 2290-91. Apparently the hypercritical standard of review applied by the plurality in *City of Mobile* is now to be applied only where the plaintiffs lose.

Nor did countervailing factors weigh in favor of the Defendants in this case. The Court explicitly found that the Representative elected from the Fourth District under the 1982 plan was "reasonably receptive and sensitive to the needs of the black community," J. S. at 14a, and gave no credence to the evidence offered by the Plaintiffs purporting to show that the Representative from the Second District was unresponsive. Compare Tr. 272-73 (testimony of David Jordan) with Tr. 340-42, 357-59 (testimony of Dana Bruce Covington). This would lend support to "the State legislature's policy favoring the division of the black population of the State into two 'high impact' districts rather than concentrating it into one district." J. S. at 11a. These factors were found insufficient to defeat the

Plaintiffs' case because "Section 2 precludes dependence on this policy." *Id.* The District Court's opinion in *Upham*, the only decision which is not in accordance with Judge Wisdom's formulation, is thus in direct conflict with the decision in this case. That Court approved "the legislature's decision to create two impact districts instead of one safe district." Jurisdictional Statement at A-1-14, *Strake v. Seamon*. Unlike the District Court in this case, the *Upham* Court found it conclusive that the two Representatives elected from those districts had "established strong records of support for the concerns of black voters." *Id.*, at A-1-16.

Ironically, the most important of the *Zimmer* factors, "a lack of access to the process of slating candidates," 485 F.2d at 1305, is also present in this case, but on the part of the white minority. The Plaintiff Jordan testified that "a caucus of black delegates from various counties in the Second Congressional District" was held in July of 1982 to select a candidate for Congress. Tr. 260. That caucus selected Robert Clark, who went on to become the Democratic nominee. Tr. 261. Black voters went on to vote in a bloc to a much greater extent than white voters. It is ironic in the extreme that this conduct, condemned under *Zimmer*, should have been rewarded with a newly gerrymandered district.

III. THE REMEDY IMPOSED BY THE DISTRICT COURT AND THE FURTHER REMEDY SOUGHT BY THE BROOKS PLAINTIFFS VIOLATE BOTH THE FOURTEENTH AMENDMENT AND THE VOTING RIGHTS ACT.

The Brooks Plaintiffs are not entitled to any further relief from this Court, because the relief they have already received from the District Court violates both the Fourteenth Amendment and the Voting Rights Act. As we have already argued, Republican J. S. at 26, the Court imposed a race-conscious remedy which harmed more alleged victims than it helped. This Court has never approved a race-conscious remedy in the area of voting, and it has never approved any race-conscious remedy which harms more victims than it helps. Moreover, the legislative history of Section 2 indicates that Congress did not intend to permit such racial gerrymanders.

The District Court, however, did not violate the remedial principles set down by this Court in *Connor v. Finch*, 431 U.S. 407 (1977). Indeed, it is only because the Court followed those principles so carefully that its constitutional and statutory mistakes are so obvious. This Court was concerned that departures from "neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group." *Id.*, at 425. A district court, therefore, "should either draw legislative districts that are reasonably contiguous and compact ... or explain precisely why in a particular instance that goal cannot be accomplished." *Id.*, at 425-26. In this case, the District Court admitted that its plan "does not provide a compact geographical configuration for the Second District." J. S. at 15a. The Court nevertheless explained its departure as being necessary "to overcome the effects of past discrimination and racial bloc voting" in the Second District. *Id.*, at 14a. The Court candidly recognized that its plan "necessarily reduces the black population of the Fourth District to 41.99%." *Id.* In short, the District Court carried out its "purpose to minimize the voting strength of a minority group," *Connor v. Finch*, 431 U.S. at 425, whites in the Second District, by further "minimiz[ing] the voting strength of a minority group," blacks everywhere else.[8]

This Court in *Connor v. Finch* was not concerned with attaining some ideal representation of minority voters. Rather, it was concerned with avoiding even the appearance of racial gerrymandering. The Court cautioned the District Court "to put to rest suspicions that Negro voting strength is being impermissibly diluted." *Id.*, at 425-26. Justice Blackmun's concurrence was primarily concerned with "whether a racial or improperly motivated gerrymander has taken place," *id.*, at 427 (Blackmun, J., concurring), and to "avoid any appearance of partisanship." *Id.*, at 430 (Blackmun, J., concurring). The

[8] The District Court's care in following *Connor v. Finch* is the defect of its opinion, because, as Professor Mansfield has recently stated, "affirmative action works only when it is concealed and lied about. ... [T]he concealment and the lies are all the more necessary because everyone knows the truth." Mansfield, *The Underhandedness of Affirmative Action*, Nat'l Rev. 26 (May 4, 1984).

District Court's opinion broadcasts that a racial gerrymander has taken place. The electoral strength of both black and white voters around the State has been sacrificed to make it easier for a few black voters in the Second District to control an election. This Court has never before even hinted that a federal court may execute such a blatant gerrymander.

The Brooks Plaintiffs argue that blacks in the Fourth District may properly be disadvantaged even further in order to achieve an "increase in black voting strength in the Second District." J. S. at 17. This Court has recently rejected a similar statutory argument raised in the context of employment discrimination, where "petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group." *Connecticut v. Teal*, 457 U.S. 440, 454 (1982). As this Court concluded, "The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of ... discrimination.' *Teamsters v. United States*, [431 U.S. 324,] 342 [(1977)]." 457 U.S. at 455. Assuming, for the sake of argument, that the Brooks Plaintiffs are correct that black voters have been victimized in Mississippi, their solution is to victimize the vast majority of them even further so as to aid a small group in the Second District. A remedy which distributes its burdens and benefits so capriciously is hardly "precisely tailored to serve a compelling governmental interest," *Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Powell, J.), as is ordinarily required for race-conscious action.

The Justice Department, in a brief recently filed with the Fifth Circuit, has recognized that both blacks and whites are equally entitled to protection from such government action:

> That the proposed consent order would disadvantage nonminority employees rather than a "discreet and insular minorit[y]" (*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)) is without constitutional significance. "[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge on personal rights, rather than the individual only because of his membership in a particular group ***." *Regents of the University of California v. Bakke*, *supra*, 438 U.S. at 299 (opinion of Powell, J.); see *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

Suggestion of Rehearing en Banc for the United States as Intervenor-Appellee at 22-23, *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984) (en banc). The Department went on to criticize the remedy in that case:

> First, and most important, ... the proposed consent decree would embrace nonvictims as well as victims of defendants' unlawful discrimination ... and would thus accord racially preferential treatment to persons having no "rightful place" claim .... [G]overnment has no compelling interest in according such preferential treatment to nondiscriminatees at the expense of innocent third parties ... .

Id., at 25. The remedy in this case is equally susceptible to this criticism. It affords "preferential treatment to nondiscriminatees [whites in all districts but the Second] at the expense of innocent third parties [blacks in those districts]."[9] The relief sought by the Brooks Plaintiffs would only exacerbate the constitutional infirmity already present in the District Court's remedy.

The amendment to Section 2 does nothing to overcome this constitutional infirmity. Indeed, supporters of the compromise version were conscious of the traditional emphasis on individual rights, as expressed by this Court in *Connecticut v. Teal*, and sought assurances that the rights of individuals would not be lost in the rights of a class. The following interchange between Senator Gorton and Senator Dole is indicative:

[9] This Court has agreed with the Department's position, on statutory grounds, holding only last week that a race-conscious remedy is appropriate "only when the beneficiary of the award has actually been a victim of illegal discrimination." *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, No. 82-206, slip op. at 16 (June 12, 1984). There is no indication in this record that the white beneficiaries of this award have ever been victims of illegal discrimination.

> MR. GORTON. Is Congress in any way transforming what in my mind ought to be an individual right into a "class right"?
>
> MR. DOLE. Senator, you raise an important point. I think I can best respond in this way: The right to vote remains an individual right, but in some cases the denial of their right may be based on a class characteristic.

128 Cong. Rec. S7120 (daily ed. June 18, 1982). Assuming that the right to vote is even implicated in redistricting decisions, but cf. *Smith v. Winter*, 717 F.2d 191, 196 n.3 (5th Cir. 1983), the right of white individuals in the Second District and black individuals everywhere else has been denied purely on the basis of "a class characteristic."

This concern for individual rights and rejection of racial gerrymandering was most obvious in the debate over proportional representation, eventually resulting in the language codified in Section 2(b). Counsel for the Brooks Plaintiffs now says, "This entire subsection addresses only what constitutes a violation, and does not control the issue of a remedy." J. S. at 14. He thereby finds himself in the awkward position of agreeing with Chairman Hatch, who had consistently taken that position throughout the debate. Senate Report at 97 (additional views of Sen. Hatch). The awkwardness is compounded by his own testimony before the Subcommittee on the Constitution: "The specter raised by some witnesses at these hearings that this 'results' standard would lead to proportional representation by race and racial quotas has no basis whatsoever." Senate Hearings at 1204 (testimony of Frank Parker). "This has not been empty rhetoric on the part of the Fifth Circuit, but has been implemented in actual practice. Indeed, in the context of court-ordered remedial plans designed to replace unconstitutional election systems, the Court has held it impermissible to use proportional representation as a benchmark. *Marshall v.*

Edwards, 582 F.2d 927, 939 (5th Cir. 1978)."[10] Senate Hearings at 1208 (testimony of Frank Parker).[11] He apparently convinced the Democratic minority of the Subcommittee: "The minority joins the majority in rejecting proportional representation as either an appropriate standard for complying with the Act or as a proper method of remedying adjudicated violations." Subcomm. of the Constitution on the Constitution of the Senate Comm. on the Judiciary, Report on the Voting Rights Act, Comm. Print, 97th Cong., 2d Sess. 83 (1982) (additional views of Sen. DeConcini and Sen. Leahy).

Counsel now seems to think that proportional representation should indeed be used as a benchmark, so long as the benchmark is not achieved. "Providing black voters with an opportunity to elect one out of five members of Congress (20 percent) does not constitute proportional representation in any sense." J. S. at 13-14. In support of his new position, he cites a passage in the Senate Committee Report to the effect that a "court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength." Senate Report at 31. Leaving aside the unreliability of the Senate Report as an accurate index of the intent of Congress and the President, see Republican J. S. at 20-22, it should be clear that the "traditional equitable powers" of a court do not extend to racial gerrymandering. This Court has never approved such a remedy, much less made a tradition of it.

[10] The standard set forth in *Marshall* is in fact quite sound: "The boundaries should be drawn with an eye to compactness, contiguousness, and the preservation of natural, political and traditional boundaries; not racially balanced representation." 582 F.2d at 937. While counsel may now be able to distinguish this holding, the important consideration for purposes of determining Congressional intent is that he failed to do it before the Subcommittee. These, then, were the "traditional equitable powers," Senate Report at 31, Congress thought it was endorsing.

[11] Counsel took a different position in an earlier appearance before this Court: "'[T]he inability to elect a share of representatives substantially proportionate to their numbers is alleged to be a denial of the effective representation to which they are entitled under the Constitution.'" Brief for Lawyers' Committee for Civil Rights under Law as Amicus Curiae at 10, *City of Mobile*, quoting Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 360 (1976).

If Congress had intended to permit, much less mandate, such an unconventional and potentially unconstitutional remedy, it should be expected to have said so in much clearer terms. As the Justice Department has said of a race-conscious layoff order, such remedies should be considered by a court "only when it is fairly clear that Congress intended to authorize such relief and thereby force the Court to evaluate Congress' power to act through the courts on a race conscious basis." Brief for the United States as Amicus Curiae in Support of Petitioners at 25, *Boston Firefighters Union, Local 718, v. Boston Chapter, NAACP*, ___ U.S. ___, 103 S. Ct. 2076 (1983).[12] Certainly, nothing in the legislative history clearly indicates that Congress intended "to act through the courts on a race conscious basis." Courts certainly should not so act without such clear authority.

Indeed, the only race-conscious remedies which could extend to alleged victims living outside the favored district are the sorts of remedies discussed by Judge Wisdom in the context of a county commission:

> Alternatively, all nine members could be elected at-large, but each voter could be given the right to vote for only five candidates, thus ensuring that minority political interests have a chance to elect members to the board. Other alternatives are cumulative voting and transferable preferential voting.

Marengo County, slip op. at 3131 n.24. These kinds of remedies have a name: proportional representation. These are exactly the remedies which Congress and President Reagan intended to deny the courts. When the executive and legislative branches of government deny to the judicial branch the only remedy which can fully redress a denial of the substantive right defined by the courts, it becomes clear that the courts have defined the right incorrectly, as the Republican Defendants have consistently argued.

[12] This Court last week agreed that the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 107, was insufficient to support an argument that Congress had intended to authorize race-conscious remedies. Compare *Firefighters*, slip op. at 18-19 n.15, with slip op. at 27-29 (Blackmun, J., dissenting).

Regardless of the definition of the right, there is at least one remedy which would not in and of itself violate the Constitution and the Voting Rights Act. That is the remedy prescribed by this Court in *Connor v. Finch*. This Court required District Courts to divide the jurisdiction into contiguous districts, as compact and equal in population as possible, and to explain their reasons wherever they departed from those principles. Where, as here, the District Court declares its intent to prefer one race over another, that remedy becomes clearly infirm.

The proper remedy has recently been described by Judge Grady of the Northern District of Illinois:

> The relief I would grant would be a map drawn according to the traditional neutral criteria, without regard to what I believe is the constitutionally impermissible consideration of race or ethnic character. Such a map would consist of compact and contiguous districts, drawn with due regard to the one-person-one-vote requirement as well as natural political boundaries. *See, e.g., Connor v. Finch*, 431 U.S. at 425, 97 S. Ct. at 1839; *Marshall v. Edwards*, 582 F.2d at 937. It would be a colorblind map. ... [W]hatever the bloc voting effect of a colorblind map might be, it would be unintended. That, in my view, is the only way the Constitution permits. There is no way to draw racially conscious lines that will be "neutral."

Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1141 (N.D. Ill. 1982) (Grady, J., concurring in part and dissenting in part).[13] The District Court erred by failing to adhere to this standard, and the Brooks Plaintiffs are entitled to no further relief.

[13] Judge Grady's opinion was not changed by the amendment to Section 2. *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1160 n.1 (N.D. Ill. 1983) (Grady, J., dissenting in part and concurring in part).

CONCLUSION

The District Court improperly found a violation of Section 2, and awarded relief which violates both the Constitution and the Voting Rights Act. Consequently, the Brooks Plaintiffs are not entitled to the additional relief they seek on this appeal. Their Jurisdictional Statement, thus, presents no substantial questions worthy of oral argument on appeal. The Judgment of the Court below should not be affirmed, however, because it is under attack in No. 83-1722. Probable jurisdiction should be noted of that appeal, and the Judgment should be reversed.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
v.
83–1722 (5) OWEN H. BROOKS ET AL.

OWEN H. BROOKS ET AL.
v.
83–1865 (4) WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM A. ALLAIN ET AL.
v.
83–2053 (5) OWEN H. BROOKS ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2053. Decided November 13, 1984

The judgment is affirmed.

JUSTICE STEVENS, concurring.

Although I agree that a summary affirmance of the judgment of the District Court is entirely appropriate in this case, what has been written in dissent prompts me to make two important points.

First, there is little, if any, resemblance between the argument advanced in the dissenting opinion and the specific questions presented in the parties' jurisdictional statements. This Court has determined that summary affirmances "reject the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). The only questions presented in the jurisdictional statement that the Mississippi Republican Executive Committee filed in case No. 83–1722 read as follows:

"1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.

"2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.

"3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.

"4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Juris. Statement i.[1]

Second, the dissent does not fairly characterize the opinion of the District Court. That opinion does not "in effect" construe the recent amendment to § 2 of the Voting Rights Act as entitling "minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State redistricting plan invalidated if it has failed to provide at least one district in which the 'minority' is a majority of the eligible voters." *Post*, at 1. The dissent buttresses this incorrect impression by attributing the following statement to the District Court:

> "The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would

[1] The Jurisdictional Statement that William A. Allain and others filed in No. 83–2063 presents two questions that are similar to those presented in No. 83–1722 and also presents the question whether the District Court erroneously found as a fact that black persons in Mississippi—and especially in the Delta generally—have less education, lower incomes, and more menial occupations than white persons, and that there has been racially polarized voting in Mississippi. See n. 2, *infra*. Nothing in the dissenting opinion indicates that it believes these questions merit full briefing and argument. In my judgment the jurisdictional statement in No. 83–1865 raises a more serious question, but I do not understand that the dissenting opinion favors review of that question.

> have a 'clear black voting age population majority of 52.83 percent.'" *Post*, at 4.

What the District Court actually said was this:

> "In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." App. to Motion to Dismiss or Affirm of Owen H. Brooks 14a.

The District Court's conclusion that its remedy was required was not based on any notion that the law gives every minority group an entitlement to some form of proportional representation. Its conclusion was quite the contrary. It rested on specific findings of fact describing the impairment—or "dilution" if you will—of the voting strength of the black minority in Mississippi. Those factual findings reveal that Mississippi has a long history of de jure and de facto race discrimination,[2] that racial bloc voting is common in Missis-

[2] Regarding past discrimination, the District Court carefully found that Mississippi had often used poll taxes, literacy tests, residency requirements, white primaries and violence to intimidate black persons from registering to vote. More importantly, the court found "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." App. of Motion to Dismiss or Affirm of Owen H. Brooks 9a. Additionally, the court wrote:

"Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

"The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in the Delta region, generally have less education, lower in-

sippi, and that political processes have not been equally open to blacks.[3]

Because I find no merit in any of the specific challenges presented in the parties' jurisdictional statements,[4] and because the record supports the District Court's findings of fact, as the dissent notes, *post*, at 10, I join the Court's summary affirmance.

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comes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. . . . Census statistics indicate lingering effects of past discrimination: the median family income in the Delta region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing." *Id.*, at 9a–10a (footnote omitted).

[3]The court also found that there existed "persuasive evidence" the Mississippi's political processes have not recently been open to black persons. In addition, the court particularly noted the following message accompanying a campaign television commercial:

"You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations." App. of Motion to Dismiss or Affirm of Owen H. Brooks 12a, n. 8.

The commercial opened and closed with a view of Confederate monuments; the candidate that ran the commercial used "He's one of us" as his campaign slogan. *Ibid.*

[4]Indeed, it should be noted that the District Court's plan would be an acceptable remedy for the violations even if it did not regard the Simpson plan itself as a violation of § 2 of the Voting Rights Act as amended. For after our remand, the District Court could have appropriately decided that the policy of that Act, coupled with the findings of fact concerning the effects of historic discrimination, particularly in the Delta area, required a remedy that established at least one district in which black persons represented an effective majority of the eligible voters.

OPINION

SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
83–1722 (6) v.
OWEN H. BROOKS ET AL.

OWEN H. BROOKS ET AL.
83–1865 (5) v.
WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM A. ALLAIN ET AL.
83–2063 (6) v.
OWEN H. BROOKS ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2063. Decided November 13, 1984

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The District Court's ruling in this case presents important questions concerning the construction of the recent amendment to §2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (1982). The District Court in effect has construed the amendment to entitle minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State re-districting plan invalidated if it fails to provide at least one district in which the "minority" is a majority of the eligible voters. This is so even though the challenged re-districting plan is constitutional, is not the product of discriminatory intent, and indeed was intended by the court which adopted it to "deal fairly with [the State's] black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength."

In 1982, the District Court in this case adopted a re-districting plan for Mississippi's congressional districts in order to remedy district population disparities, revealed by the 1980 census, of up to 17%. In choosing from among several plans offered by the litigants, it sought a plan that would "satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Jordan* v. *Winter*, 541 F. Supp. 1135, 1142 (ND Miss. 1982) *(Jordan I)*. The court further observed that "[w]hat is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength." *Id.*, at 1143. The court chose the so-called "Simpson" plan because it satisfied most of the state's policy considerations in districting, created two districts with 40% or better black population, and included a district where nearly 54% of the population was black.

On appeal to this Court, the judgment of the District Court was vacated and the case remanded for reconsideration in the light of the 1982 amendments to the Votings Rights Act. *Brooks* v. *Winter*, —— U. S. ——, 103 S. Ct. 2077 (1983). On remand, the District Court found that the very plan which it had approved and adopted in 1982 was unlawful under the amended § 2 of the Voting Rights Act because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." *Jordan* v. *Winter*, No. GC82–80–WK–0 (ND Miss., April 16, 1984) *(Jordan II)*. I think the rather remarkable conclusion that the 1982 amendments to the Voting Rights Act made unlawful a plan adopted by the District Court, which plan the District Court had adopted with a view to the requirement that "the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength," should receive plenary review by this Court.

After being presented with the census data revealing the previously mentioned population disparities between existing

congressional districts, the Mississippi Legislature in 1981 enacted a new re-districting plan. The Attorney General of the United States refused pre-clearance, however, and the Legislature adjourned without enacting a new plan. A three-judge District Court was convened to hear actions filed by two groups of Mississippi voters seeking a court-ordered interim plan for the 1982 congressional elections. That court refused to place in effect the legislative plan which had not been pre-cleared, and held the exiting districting statute unconstitutional because of the population disparities. It then adopted the "Simpson" plan from among several plans submitted to it by the litigants. *Jordan I*, *supra*.

In choosing the Simpson plan, the court followed the teaching of *Upham* v. *Seamon*, 456 U. S. 37 (1982), which requires courts to fashion interim plans that adhere to a State's political policies. The court identified Mississippi's political districting policies as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. The court specifically rejected two plans proposed by a group of black plaintiffs. These plans would have kept the predominantly black Northwest or "Delta" portion of Mississippi intact, and would have combined that area with predominantly black portions of Hinds County and the City of Jackson. Each of these plans would have resulted in one congressional district with a black population of approximately 65%. The Simpson plan, on the other hand, combined 15 Delta or partially Delta counties with six predominantly white eastern rural counties, and resulted in a congressional district with a 53% black population, but a 48% black voting population. The District Court found the Simpson Plan most nearly in accord with the State's policies articulated above. The rejected plans would have resulted in only one district with greater than 40% black population; this was contrary to the reasonable state policy established to

assure that blacks would have an effective voice in choosing representatives in more than one district. In addition, the court noted that the black plaintiffs had managed to place a high percentage of black voters in a single congressional district only through obvious and unseemly racial gerrymanders.

When this Court subsequently vacated the District Court's judgment for reconsideration in the light of the 1982 amendment the District Court held further evidentiary hearings, and concluded that its own plan violated the amended section. This violation occured, in the opinion of the District Court, because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." Under the plan adopted by the District Court in 1982, the Second District had a black population of 53.77%, but blacks comprised only 48.06% of the voting age population. The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a "clear black voting age population majority of 52.83 percent." In doing so, the District Court "recognize[d] that the creation of a Delta District with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." *Jordan II*, *supra*.

Any statute that would lead a District Court to reject a plan which it had previously found fair to all concerned in favor of one including an obligatory district with a majority black voting age population deserves careful attention, and so I turn to the language of the Voting Rights Act as amended in 1982. The District Court in its most recent opinion set out the statutory provisions toward the beginning of its opinion, but scarcely mentioned that language again, and instead went on to quote extensively from the Senate Report of the 1982 amendments. The applicable statutory language is this:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in § 4(f)(2), as provided in subsection (b).
>
> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U. S. C. § 1973 (emphasis in original).

Applying the statutory language to the situation confronting the District Court after our remand, the "voting qualification or prerequisite to voting or standard, practice, or procedure" to which the amended statute is to be applied is obviously the 1982 plan adopted by the District Court. That court clearly thought so, and no other "qualification . . . standard, practice, or procedure" suggests itself. There has never been any suggestion that the plan adopted by the District Court in 1982 denied or abridged the right of any citizen to vote on account of race or color, so if that plan does violate the amended act it is because it contravenes "the guarantees set forth . . . in subsection (b).

Subsection (b), in turn, provides that a violation of subsection (a) is established if "[i]t is shown that the political

processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." The District Court read subsection (b) as if it were totally divorced from subsection (a), and proceeded to enumerate factors in the political history of Mississippi which it felt indicated that the plan it had adopted in 1982 "unlawfully dilutes minority voting strength." *Jordan II*, *supra*. The District Court did not state what it understood the term "unlawfully dilutes minority voting strength" to mean, and since that term is nowhere used in the statutory language one is left to infer that the court derived the necessary meaning for the language from the report of the Senate Judiciary Committee which it cited at some length. The District Court's understanding of what is required by § 2 is highly questionable in light of the statute's language and legislative history. To fully evaluate the District Court's analysis it is necessary to review the events preceding the amendment of § 2.[1]

In *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court wrestled with the question whether legislative "intent" to discriminate must exist in order to find that a particular legislative action violates the Voting Rights Act, or whether it was enough that the legislative action have a "discriminatory effect." In *City of Mobile* black plaintiffs had brought an action challenging the constitutionality of the city's at-large method of electing its commissioners. We produced six different opinions debating among ourselves whether discriminatory intent was required to find a violation of the Fifteenth Amendment, or whether "an invidious discriminatory purpose could be inferred from the totality of facts." *Id.*, at 95 (WHITE, J., dissenting). None of the opinions challenged the conculsion of the plurality that the Voting Rights Act as it then existed added, "nothing to appellee's Fifteenth Amendment claim." *Id.*, at 61 (Opinion of Stewart, J.).

[1] JUSTICE STEVENS' concurrence suggests that my analysis is unwarranted because the problems I perceive with the District Court's opinion were not specifically raised by the "questions presented" in appellants' jurisdictional statements. I believe, however, that several of the "questions presented" "fairly include" the issues that I address. In particular, question 3, cited *supra*, at —— (STEVENS, J., concurring), raises the question of the scope of activity Congress intended to proscribe under § 2. I need not agree 100% with appellants' position—that § 2 only proscribes intentionally discriminatory conduct—to reach the question whether the District Court misconstrued Congress' intent.

It is clear that the 1982 amendment was precipitated in large part by the holding of *City of Mobile*. But the language used in the amended statute is, to say the least, rather unclear. The legislative history indicates that Congress was well aware of the "intent"—"effects" dichotomy, and of the problems with identifying actions with discriminatory "effects." The bill originally passed the House under a loose understanding that § 2 would prohibit all discriminatory "effects" of voting practices, and that intent would be "irrelevant." H. R. Rep. No. 97–227, p. 29. This version met stiff resistance in the Senate, however. Two Senate subcommittees held extensive hearings, at which testimony was given concerning the tendency of a "results" approach to lead to requirements that minorities have proportional representation, or to devolve into essentially standardless and ad hoc judgments. See, *e. g.*, Hearings on S. 53 et al. before the Senate Subcommittee on the Judiciary, 97th Cong., 2d Sess., 1309–1313, 1334–1338 (1982). The subcommittees could not agree on the proposed amendment, and at that point Senator Dole stepped in with a proposed compromise. The compromise bill retained the "results" language but also incorporated language directly from this Court's opinion in *White* v. *Regester*, 412 U. S. 755 (1973), and strengthened the caveat against proportional representation. The debates on the compromise focused on whether the "results" language would nevertheless provide for proportional representation, or merely for equal "access" to the political process. Senator Dole took the position that "access" only was required by amended § 2: "[T]he concept of identifiable groups having a right to be

elected in proportion to their voting potential is repugnant to the democratic principles on which our society is based." See 128 Cong. Rec. S6961 (1982) (remarks of Senator Dole). This position was adopted by many supporters of the compromise in the Senate, and the bill passed as written.

The District Court apparently felt obliged to reach a conclusion in tension with this legislative history because of language in the Senate Judiciary Committee Report on the 1982 amendment stating that the "results" language of § 2(a) was meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." S. Rep. No. 97–417, p. 27 (1982). The Report then enumerates the factors courts may consider in deciding whether plaintiffs have established a violation of § 2, factors apparently derived from this Court's opinion in *White* v. *Regester*, *supra*.[8] Applying these "factors," the District Court found that Mississippi has

[8] Those factors are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 97–417, *supra*, pp. 28–29.

a long history of *de jure* and *de facto* race discrimination, which has present effects in impeding black voter registration and turnout. It noted that although blacks constitute 35 percent of the state's population, no black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Furthermore, the court found socioeconomic disparities between blacks and whites in the Delta area, and finally, that voters in Mississippi have previously voted and continued to vote on the basis of the race of candidates for elective office. The District Court concluded from this that the adoption of a plan in which the Second District contained less than a majority of voters from a protected class "diluted" the class' voting strength.

Thus we have a statute whose meaning is by no means easy to determine, supplemented by legislative history which led the District Court in this case to conclude that only the inclusion within one congressional district of a majority black voting age population could satisfy the Act. I think it can be fairly argued from the legislative history, and from the express caveat that the section was not intended to establish a right to proportional representation, that in amending § 2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class.

To best understand the meaning of the Senate Committee's references to our decisions in *City of Mobile* and *White* v. *Regester*, it is essential to remember that those cases dealt with challenges to *multi-member legislative districts*. It is only in this context that phrases such as "vote dilution" make any sense, for the phrase itself suggests a norm with respect to which the fact of dilution may be ascertained. In the case of multi-member districts, the norm available for at least theoretical purposes is the single-member district. But when we turn from attacks on multi-member districts to attacks on the way lines are drawn in creating five single-member con-

gressional districts, as in the case at hand, phrases such as "vote dilution" and factors relied upon to determine discriminatory effect are all but useless as analytical tools. Neither *White* v. *Regester*, *supra*, *City of Mobile* v. *Bolden*, *supra*, nor *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), a case also dealing with challenges to multi-member legislative districts, ever suggested that their analysis should be carried over to challenges addressed to single member districts. And whichever of the views espoused in *City of Mobile* is found to have been adopted by the 1982 amendment, it would seem that a plan adopted by the District Court under the command "that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength" should be home free under either test.

Under this view, the District Court's most recent opinion and judgment seems to me to present virtually insuperable difficulties. Although we may regretfully concede that the District Court's findings were correct, it nevertheless seems a non sequitur to say that the past discrimination, and its present effects, have "resulted" in "dilution" of minority voting strength *through the adoption of this particular districting plan*. To the extent that less blacks vote due to past discrimination, that in itself diminishes minority voting strength. But this occurs regardless of any particular state voting practice or procedure. As the plurality opinion in *City of Mobile* recognized in another context, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile*, 446 U. S., at 74. Here the only finding even remotely related to the boundaries of the Second Congressional District under the 1982 plan is what the District Court referred to as "socioeconomic disparities between blacks and whites in the Delta area." The findings as to the history of racial discrimination and bloc voting apparently obtained throughout the State. It is obvious that no plan adopted by

the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. What we have, therefore, is in effect a declaration by the District Court that because of these past examples of racial discrimination throughout the State, any plan adopted by either the legislature or by a court which did not give blacks one of five congressional districts in which they had a majority of the voting age population violated the 1982 amendments to the Voting Rights Act. Under this analysis, cause and effect are entirely severed.

For these reasons, I think the judgment of the District Court presents substantial questions concerning the interpretation of a new amendment to the Voting Rights Act of 1965, and that the Court seriously misapprehends its obligation in such a case when it summarily affirms the judgment of the District Court.